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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED,

Petitioner,

vs.

PRENTISS M. BROWN, Administrator, Office of Price Administration.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Robert B. Holland,
Dallas, Texas;
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INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	1
Jurisdiction	2
Statute and regulation involved	2
Questions presented	3
First question	4
Second question	6
Third question	7
Fourth question	9
Fifth question	11
Statement	16
Specification of errors to be urged	23
Reasons for granting the writ	26
Conclusion	27
Brief in support of petition	29
Opinions below	29
Jurisdiction	29
Statement of case (see petition)	30
Specification of errors	30
Summary of argument	33
Argument	35
Point One	35
Point Two	39
Point Three	42
Point Four	47
Point Five	55
Point Six	56
Point Seven	58
Point Eight	59
Point Nine	63
Conclusion	65

Table of Cases Cited.

Baird v. *St. Louis, I. M. & S. Ry. Co.*, 41 F. 592	51
Commercial Corporation v. *New York Barge Corp.*, 314 U. S. 104	40
Davis v. *Ill. Central Ry. Co.*, 16 I. C. C. 376	51
Davis v. *O'Hara*, 266 U. S. 314	42
Dubinsky v. *Lortz*, 129 F. (2d) 669	63

Page

Drybrough v. *Ware*, 111 F. (2d) 548 62
Foster v. *Special Site Sign Co.*, 85 F. (2d) 742 55
Georgia Rough & Cut Stone Co. v. *Georgia Ry. Co.*, 13 I. C. C. 401 51
Indemnity Insurance Co. v. *Moses*, 36 F. (2d) 219 63
Lillienthal v. *United States*, 97 U. S. 237 41
Omaha Hotel Co. v. *Wade*, 97 U. S. 13 42
Osage Oil and Refining Co. v. *Continental Oil Col*, 34 F. (2d) 585 62
Peck v. *Henrich*, 167 U. S. 624, 42 L. Ed. 302, 17 Sup. Ct. 927 55
Ramming Real Estate Co. v. *United States*, 122 F. (2d) 892 55
Reliance Life Ins. Co. v. *Burgess*, 112 F. (2d) 234 42
Southern Railway Co. v. *Montgomery*, 46 F. (2d) 990 ... 63
Twachtman v. *Connelly*, 106 F. (2d) 501 63
Van Huffel v. *Harkelrode*, 284 U. S. 225, 76 L. Ed. 256, 52 Sup. Ct. 115 55
Virginia Railroad Co. v. *Mullens*, 271 U. S. 220, 70 L. Ed. 915, 46 Sup. Ct. 526 55
Wesley Corporation, In re, 18 F. Supp. 347 63

STATUTES CITED.

Bill of Lading Act, Aug. 29, 1916, c. 415, Sec. 20, 39 Stat. 541 51
Emergency Price Control Act of 1942, Chapter 26, 56 Stat. 23, 50 U. S. C. A. App., Sec. 901 to 946 2,56
Judicial Code, Section 240(a) 2
General Maximum Price Regulation, 7 Fed. Reg. 3153. 2,21

OTHER AUTHORITIES CITED.

88th Cong. Rec. Jan. 8, 1942, p. 108 57
House Committee H. R. 5990, 77th Congress, 1st Session (1941) 56
H. R. 5990, 77th Congress, 2nd Session (Jan. 12, 1942) .. 56
Rules of Civil Procedure, Rule 52(a) 3
Senate Committee H. R. 5990, 77th Congress, 2nd Session (Jan. 2, 1942) 56
9 Pike & Fisher OPA Service 700: 128 57
IX Wigmore On Evidence, Third Edition:
Sec. 2485 41
Sec. 2487 41

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MARS, INCORPORATED,

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vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court and remanding the case with instructions to enter a decree of injunction against Petitioner.

Opinions Below.

The opinion of the District Court (R. 20) is reported in *49 Fed. Sup. 533.*

The opinion of the Circuit Court of Appeals (R. 647) is reported in *135 F. 2d 843.*

Jurisdiction.

The date of the judgment of the United States Circuit Court of Appeals is May 7, 1943 (R. 647). Petition for rehearing duly and timely filed by Petitioner in that court on May 15, 1943 (R. 673) was denied on May 27, 1943 (R. 687). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

Statute and Regulation Involved.

The Emergency Price Control Act of 1942, Chapter 26, 56 Stat. 23; 50 U. S. C. A. App., Sec. 901 to 946, inclusive, authorized the promulgation of regulations. Pursuant to this law, on April 28, 1942, the Administrator of the Office of Price Administration promulgated the General Maximum Price Regulation (hereinafter for the sake of convenience referred to as GMPR), (*7 Fed. Reg. 3153*).

Respondent based this suit upon the alleged violation by Petitioner of Sections 2 and 11 of General Maximum Price Regulation, the pertinent provisions of which are as follows:

> "Section 2 * * * Seller's maximum price for any commodity * * * shall be,
>
> (a) The highest price charged by the seller during March, 1942:
>
> (1) for the same commodity."
>
> "Section 11. Every person selling commodities * * * shall * * *
>
> (b) Prepare * * * a statement showing:
>
> (1) the highest price which he charged for such of those commodities * * * as he delivered * * * during March, 1942, * * * together with an appropriate description or identification of each such commodity."

Questions Presented.

The principal questions presented in this case are:

First. Whether the Circuit Court of Appeals was authorized to direct the District Court to enter a decree enjoining Petitioner "from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices *shown on its invoices and bills of lading* during March, 1942"; and

Second. Whether under Rule 52 (a) of the Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, the Circuit Court of Appeals was authorized to set aside findings of the District Court against Respondent with respect to the alleged violations of Sections 2 and 11 of General Maximum Price Regulation.

Third. Whether the Circuit Court of Appeals was authorized to find that: the use by the Trial Court of the Bureau certified weights was "clearly erroneous"; that the Trial Court should have used the invoices and accepted bills of lading weights; when, in fact, the *sole* basis for the invoice and bills of lading weights were the very Bureau certified weights which the Circuit Court had just condemned.

Fourth. Whether the Circuit Court of Appeals can properly grant relief upon a new theory which the Respondent neither plead, proved, nor relied upon on appeal.

Fifth. Whether the Circuit Court upon its own Motion can, on behalf of the Administrator of the Office of Price Administration, compel far reaching changes in industry, in violation of the provisions of the Emergency Price Control Act which specifically prohibits the compelling of such changes.

First Question.

As to the first of these five principal questions—we wish to first call the Court's attention to the variance between the decree directed to be issued and Section 2 of General Maximum Price Regulation. In order to do this, it is necessary that this Court understand what Petitioner's invoices and bills of lading for March, 1942, showed with respect to the highest price of Petitioner's candy bars.

The price in dollars and cents in March, 1942 was, in all cases, 68¢ per box of twenty-four bars, and there has been no variance in this price since the effective date of General Maximum Price Regulation.

The agreed shipping weight, which did not necessarily correspond with the actual shipping weight per carton, was also shown on these invoices and bills of lading. Petitioner had an agreement with the Western Weighing and Inspection Bureau, under the terms of which for the sake of convenience of Petitioner and the various railroads over which it shipped its candy bars, an average weight determination was made which did not necessarily represent the true weight of any particular carton of Petitioner's bars actually shipped (R. 264-5). In fact, the testimony with respect to the weight determinations showed that the invoice and bill of lading weights never corresponded exactly with any of the weights of the actual cartons used in arriving at the average weight determination (R. 292 to 330). Although the undisputed testimony showed that there was a change in the actual and average weights of Petitioner's candy bars and cartons thereof on March 23, 1942, this change in weight was not shown on invoices and bills of lading dated prior to April 1, 1942, in spite of the fact that there was actually a weight determination by the representative of the Western Weighing & Inspection Bureau on March 31, 1942 (R. 212, 246, 554, 596A).

Since weight and price are the only two possible variables on the invoices and bills of lading, and there has never been any contention that there has been any variation in the selling price shown thereon, it follows that the Decree must have reference to weight alone. And this, in spite of the fact that the undisputed testimony showed that there were variations in the ingredients and proportions thereof both in March, 1942, and during the period of the alleged violation (R. 208-212, 552-555).

Thus, while the direction of the Circuit Court of Appeals is not specific and clear, yet taken in context with the opinion of the Court, the apparent meaning of the direction is that the trial court shall issue a decree enjoining Petitioner from selling, delivering, or offering for sale or delivery any candy bars with weights less than the average weight shown on Petitioner's invoices and bills of lading during March, 1942 (R. 670).

Therefore, if any carton of Petitioner's candy bars sold after the effective date of the decree directed to be entered by the Circuit Court of Appeals, weighed less than the average weight of its cartons in March, 1942, as shown on its invoices and bills of lading during March, 1942, Petitioner would be in contempt of court. In other words, Petitioner, under the injunction, will be required to maintain a minimum weight at this time equal to the average weight in March, 1942. Since the undisputed testimony showed that there are uncontrollable variations in the weight of Petitioner's bars, boxes, and cartons thereof, this necessarily means that the average weight of Petitioner's bars and cartons thereof must be increased above the average weight of such bars and cartons thereof during March, 1942 (R. 238-241, 245-250). This variation amounted to from ¼ to ½ ounce per bar (R. 262). We submit that this ruling of the Circuit Court is manifestly erroneous, and that it was never the intention of Congress or of the Price Ad-

ministrator that Petitioner and others in the candy industry should be required to increase the weights of their candy bars above the March, 1942 base.

Respondent's pleading does not authorize the decree directed to be issued by the Circuit Court of Appeals. Respondent alleged that "defendant has increased the price of all commodities sold and delivered by it * * * in excess of the highest price charged therefor by defendant during the month of March, 1942" (R. 3); and prayed that defendant be enjoined "from directly or indirectly selling, delivering, or offering for sale or delivery any candy bar at prices in excess of those established by the General Maximum Price Regulation" (R. 3).

In other words, the injunction directed to be issued by the Circuit Court of Appeals is against sales in excess of an average price (manifestly less than the highest) whereas the injunction prayed for by Respondent was against sales in excess of the highest price charged.

In his prayer for injunction, the Respondent sought to restrain Petitioner from selling any candy bar at prices in excess of those established by the General Maximum Price Regulation. The prayer does not mention invoices nor bills of lading. The Circuit Court, without prayer or provocation, went outside of the pleadings to enlarge the relief sought, by its own motion, and ordered the enjoining of the Petitioner for selling any candy bars at prices in excess of those shown on its *invoices* and *bills of lading* during March, 1942.

Second Question.

As to the second principal question—the trial court found against Respondent on each of the two counts in the Bill of Complaint; or, in other words, found as to the First Count, that there had been no sales in excess of the highest price charged by Petitioner in March, 1942; and as to the

Second Count, that the statement showing the highest price which Petitioner charged for all commodities sold and delivered by it during March, 1942, was correct.

As to the first finding, the evidence offered by the Respondent was insufficient to form the basis of a finding of a price violation. The only evidence offered in this connection was (1) the so-called formula cost sheets, which Respondent and the Circuit Court of Appeals both admit were not of any evidentiary value (Respondent's Brief in Circuit Court at page 32, and Court's Opinion, R. 670); and (2) agreements as to average weights for convenience in shipping which admittedly did not show true weights nor take into consideration any other price controlling factor than weight.

On the other hand, Petitioner offered evidence as to the weights of individual bars in March, 1942, and of individual bars manufactured during the period of the alleged violation, and in every instance the bars manufactured during the period of the alleged violation were heavier than the bars manufactured during March, 1942 (R. 254, 583-590). In addition to this, Petitioner's uncontradicted testimony showed that more ingredients by weight per 24-bar box were used in the period of alleged violation, than during March, 1942 (207-214, 554, 555, 569A). In the face of this testimony, the Circuit Court of Appeals held that the findings of fact by the trial Judge were clearly wrong, and substituted its own findings, which were contrary to the undisputed testimony in the case.

Third Question.

As to the third principal question, it is apparent that in its desire to find justification for its decision, the Circuit Court fell into a pitfall of its own creation. The Circuit Court finds that the trial Judge's findings were "clearly erroneous" insofar as they are based upon the certified

weights (that is, Western Weighing and Inspection Bureau Agreement weights). That instead of using the Bureau weights, the trial Judge should have followed the "invoice and accepted bills of lading which showed the weights." Obviously the Circuit Court did not realize that the *sole* basis for the weights as shown upon the invoices and bills of lading that were introduced in evidence, were the Bureau weights.

This mistake which the Circuit Court made is clearly demonstrated by a review of the record. Such a review shows that the Bureau agreement weights had been the basis for the preparation of all invoices and rail shipments from the Mars, Incorporated plant at Chicago for many years (R. 191). In fact, the agreement with the Bureau had been in effect since September 15, 1929 (R. 346).

According to the testimony of a representative of that Bureau who was called by Respondent as a witness, the average weight as found by the Bureau is used by the shipper for billing purposes (R. 107). The Bureau subsequently checks the shipper's invoices, loading tallies and bills of lading to see that shipments have been made in accordance with the averages as established by the Bureau (R. 107). The Bureau agreements (R. 291 to 330) and the invoices in evidence (R. 348 to 498) bear this out.

Thus it is inescapable that weights as established by the Bureau are identical with weights as shown on invoices and bills of lading for practically all shipments from the factory at Chicago. How can the Circuit Court be authorized to say that using the weights shown on one for a finding of fact is clearly erroneous, while the weights shown on the other is "the evidence which should have been used?" (R. 670.) Incidentally, the Respondent rested his case in the trial Court and upon appeal on these very "determinations of weight by the Western Weighing and Inspec-

tion Bureau Certificates" which the Circuit Court so vigorously condemns (Respondent's Brief in Circuit Court Page 38).

[The Petitioner should not be understood as contending that the Bureau, invoice, and bills of lading weights were correct for the purpose of determining the selling price of the candy. To the contrary, the Petitioner has always contended that these weights were only rough averages used for convenience in shipping only. It is undisputed that the actual average weights run under and over the agreement weights (R. 265). The record shows that *all* bureau, invoice and bills of lading weights were incorrect when eleven separate carloads of candy were check-weighed (R. 194-198, 242-244, 259-261, 549.]

Fourth Question.

As to the fourth question, the record shows that the Respondent changed his theory of his right to the injunction during the pendency of the action. Respondent plead his case by naming the individual candy bars as the "commodity," by charging that all of the bars, of the same kind, manufactured in March contained exactly the same ingredients, and by asserting that all purchasers after May 11, 1942, received approximately 11% less candy than they received during the month of March (R. 1, 2). These allegations were all abandoned during the trial.

At the time of the trial in closing argument for Respondent, his counsel admitted that the bars were not all identical (R. 611). Respondent's counsel admitted that he had been unable to prove the charged 11% reduction by urging as "our concept in percentages" figures ranging from 5.1% to 6.3% (R. 617). During the trial the Respondent relied heavily upon the "cost sheets" (which he erroneously referred to as "formula" cost sheets). In fact, approximately twenty pages of testimony and more

than three hundred pages of exhibits in the record, were based principally upon these "cost sheets" (R. 152-164, 498-516).[1]

Upon appeal, these "cost sheets" were disowned and abandoned (Appellant's Brief in Circuit Court Page 32). Further, upon appeal to the Circuit Court, the Respondent abandoned his plead figure of 11%, and also abandoned his trial court figures of 5.1% to 6.3%. He offered a new set of figures as to his claimed reduction of from 2.61% to 12.84% (Appellant's Brief in the Circuit Court Page 14). Upon appeal no mention was made in Appellant's brief of "all bars of a kind in March containing exactly the same ingredients, and weighing exactly the same", nor of "the 11% reduction in all bars after May 12, 1942", as such.

The Circuit Court evidently realized that there could be no common ground found on which the Respondent's Pleadings, proof and appeal could be rationalized. Further, the Circuit Court seems to have realized that the relief as prayed for by Respondent could not be granted.

The Circuit Court abandoned the Appellant's evidence and brief in deciding that the Western Weighing and Inspection Bureau certificates were erroneous (R. 670). It had been upon these very certificates that the Respondent had sought to prevail (Appellant's brief in the Circuit Court Page 38 and R. 612). The Respondent considered the Bureau certificates and the invoice weights to be identical (R. 612). The Respondent did not place any dependence upon bills of lading as such (Appellant's Brief in Circuit Court Page 38).

The Circuit Court, after having abandoned the Respondent's pleadings and theory of attack in the trial and upon the appeal, substitutes a *new theory* of its own: to-wit,

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[1] Exhibits concerning this abandoned plea have not been included in the Petitioner's designation of the record.

that the invoices and bills of lading prices as of March should be the foundation for the injunction.

In the closing lines of his brief on appeal, the Respondent asked that the trial Court be instructed to enter appropriate findings in accordance with the Respondent's proof, and sought a decree pursuant to the prayer in the Respondent's Complaint (Appellant's Brief in the Circuit Court Page 59). The Circuit Court granted no such relief. Instead, the Circuit Court entered an order upon an entirely new theory of its own; an order without justification in the Respondent's pleadings, evidence or brief.

Fifth Question.

The Emergency Price Control Act, Section 902, provides as follows:

> "(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act."

Apparently the Circuit Court overlooked this provision in the Act when the opinion was written. Although the Court's attention was directed by the Appellee's Petition for Rehearing to the changes its opinion authorized the Administrator to compel in industry, nevertheless the Circuit Court denied rehearing (R. 687).

In the petition for rehearing, Petitioner set out in detail the five principal changes compelled in the Company's business practices by this decision. Changes (3) and (4) there are combined here, for brevity (R. 683 to 687). If Mars, Incorporated, has not been singled out and discriminated against, then apparently the entire piece and package goods industry has been compelled to make the same changes in business practices. At no time has the Respondent

ever claimed or contended that these changes were made to prevent circumvention or evasion of any regulation, order, price schedule or requirement under the Emergency Price Control Act. Therefore, it would seem that the compelling of such changes is unlawful. The four or five principal changes in the business practices in the industry of which Mars, Incorporated, is a part, are as follows:

(1) Under the *old* business practices, invoices were written up from one day to twenty days before shipment was made.

Under the *new* practice, as ordered by the Circuit Court, this would not be possible. (See lists and record references at R. 678, 683.)

(2) Under the *old* business practices, Mars, Incorporated, only attempted to manufacture candy bars to a weight tolerance of from ¼ to ½ ounce per bar, which amounted to from 10% to 20% (R. 262, 264, 684).

The Circuit Court has said "the only evidence as to a range of variance was that it might be 5% above or below the wrapper weight" (R. 661). The Circuit Court was wrong (R. 684). It confused evidence as to variations in shipping tolerances with evidence as to variations in individual bars; but right or wrong, under the *new* practice, apparently candy manufacturers are called upon to reduce the variations on individual bars from 20% to 5%, because the Circuit Court misunderstood the testimony (R. 262, 264, 684).

(3) (4) Under the *old* practices, five-cent candy bars were sold as individual bars, and on a count per box basis. Weight was not considered by the purchasers. The witnesses for Respondent so testified (R. 91, 113, 114). The Respondent recognized that the sale of five-cent candy bars was by individual bars upon a count per box basis in his official opinions and orders dealing with other candy bar sale (R. 623, 627, 630, 632, 634, 636, 638). In none of these

opinions or orders which concern competitive candy companies does the Respondent mention invoice or bills of lading shipping average weights.

Under the *new* practice as ordered by the Circuit Court, the candy industry, or at least Mars, Incorporated, is ordered to adopt a new method of selling its candy; that is, upon the basis of *average* shipping carton weights without regard to the count per box of individual bars (R. 670). Thus, there are two changes merged into one here. Under the *new* practice, candy is sold neither as individual bars, nor upon a count per box basis, but only upon *average* shipping weight in cartons.

(5) Under the *old* practice an estimated tolerance in shipping weight cartons of 5% was allowed by the railroads, in making freight charges (R. 264). This had nothing to do with the sale price of the candy, since the manufacturer paid the freight to destination, and the purchaser was interested only in the number of bars he received (R. 91, 114).

Under the *new* practice as prescribed by the Circuit Court, the average shipping weight in March has become the basis for all pricing in the future (R. 670). Since the Circuit Court apparently confused this 5% allowance on freight weights, with the normal manufacturing variations in individual candy bars, now it would seem that freight weight variables are no longer permitted. Now the *price* of the candy itself must conform to the *March average shipping weight*. Any deviation below is a violation of the Regulation, according to the Circuit Court Opinion. Surely an average can be safely maintained only by staying above it, if the slightest deviation is to be fatal. Since the March, 1942, invoice weights were based upon January 16, 1942, weighing agreement, the Circuit Court has said in effect that Mars must use its gross shipping weights to keep its prices *lower* than the *average* price on

January 16, 1943 (R. 686). This is a new interpretation of the General Maximum Price Regulation, and is quite different from the *highest* price in *March* which the Regulation specifies *(7 F. R. 3153)*.

The Circuit Court has ordered a complete change in business practice, which has the effect of calling upon the Petitioner to keep variable shipping weights at an average, but not to permit any of the cartons to fall below the average. This is *impossible*. If the Circuit Court is correct, the only alternative left to the Petitioner is *to keep all carton weights above the January 16, 1942, average shipping weight*, even though this means a complete change in the Petitioner's method of doing business.

Circuit Court Erred in Placing Burden of Proof On Petitioner.

The Circuit Court attempted to justify its findings on the most artificial reasoning we have ever witnessed. It reasoned that the Emergency Price Control authorized a price increase resulting from innocent manufacturing practices, and that Petitioner was attempting to justify an increase in price on account of innocent manufacturing practices, to-wit, uncontrollable variations in weight and changes in ingredients and proportions thereof occasioned by war time conditions, and upon these false assumptions held that Petitioner had the burden of bringing itself within the statutory exception.

In the first place, neither the Emergency Price Control Act of 1942 nor the General Maximum Price Regulation establishes weight, rather than ingredients, as the sole or even primary factor in determining the price of commodities such as Petitioner sells, and equally manifestly there are many other factors such as taste, quality, etc. So that it is not possible to say that weight is the rule, and nature of ingredients is the exception, created by the Emergency Price Control Act of 1942 and General Maximum Price

Regulation. It therefore does not follow that Petitioner had the burden of proving that the alleged weight reduction resulted from necessary ingredient changes.

In the second place, Petitioner *did* offer ample testimony to justify the Court in finding as he did, that there had been no increase in price, if it be assumed that Petitioner here had the burden of proof on that issue (R. 142, 234).

In the third place, the only authorization in the Emergency Price Control Act of 1942 or General Maximum Price Regulation for a price increase above the March 1942 ceiling is by a specific adjustment of prices upon application. Any testimony which was or could have been offered by Petitioner in regard to manufacturing tolerances, change of ingredients, etc., would have been pertinent only insofar as such testimony showed that no price increase resulted therefrom, not as stated by the Circuit Court of Appeals, as bringing it within the exception of an authorized increase in price.

The Circuit Court erred in holding that the trial court was clearly wrong in holding that there was no proof of violation of Section 11 of General Maximum Price Regulation. In Petitioner's operations, practically all of the candy manufactured in any given day was shipped on that day. The testimony showed that there had been a reduction of weight in the candy bars on March 23, 1942, although what this average reduction amounted to was not determined until March 31, 1942—so that during the last eight days of March, 1942, Petitioner in the usual course of its business was shipping out of its plant every day approximately 3,000,000 candy bars at the reduced weight, in spite of the fact that the agreed shipping weight shown on the bills of lading and invoices had not been changed since the January determination (R. 212, 403, 554, 555).

Furthermore, the testimony showed that the very cartons used by the representative of the Western Weighing and

Inspection Bureau in making the weight determination on March 31, 1942, were placed in a box car and shipped out that day (R. 111, 188).

In spite of this testimony, the Circuit Court of Appeals held that the trial court was clearly wrong in his finding that there had been no showing of failure by Petitioner to comply with Section 11 of General Maximum Price Regulation (R. 670).

Instead of using this testimony, the Circuit Court of Appeals chose to disregard it and instead said that possibly the cartons of candy which were used in making the weight determination on March 31, 1942, and which were placed in a box car and shipped out that day, might have gone to one of Petitioner's warehouses—and this, in spite of the fact that there was not one iota of testimony in the record that Petitioner owned any warehouses, or was shipping any candy to warehouses owned by it in March, 1942—and chose to hold that the trial court's finding was clearly wrong upon the basis of a remote possibility which was based entirely on a false and unfounded premise (R. 668, 670).

We must confess that it is difficult for us to conceive of a fair, impartial tribunal's indulging in flights of fancy in order to set aside as "clearly erroneous" the findings of a trial Judge who carefully considered all the testimony in the case, who had an opportunity to judge of the credibility of the witnesses, and who based his findings upon the undisputed evidence.

Statement.

Mars, Incorporated has for a number of years manufactured six flavors of candy in the form of six distinctly named five-cent candy bars designated as:

Milky Way
Snickers

Three Musketeers
Forever Yours
Mars
Dr. I. Q.

This candy is made by a continuous process of manufacture, rather than by the usual "batch" method. As the candy progresses from its initial stage of simple sugar sirup to the various completed flavors, certain ingredient changes are made and ingredients are added to make the distinctive character of each of the six kinds of candy. (R. 131). This candy has always been sold as individual bars upon a "count per box" basis. (R. 12, 91, 114, 226, 228, 557). Since the individual bars in each flavor vary from ¼ to ½ ounce per bar in normal manufacturing practice, the average net weight of the candy bars was always slightly more than the average net weight as designated upon the wrappers. (R. 262). This is in keeping with customary practice in the candy bar industry. (R. 255, 256, 591).

In March of 1942, the six candy bars as manufactured by Mars carried the following wrapper weight designations, but the actual average weight of the bars of each of the six flavors, was slightly in excess of the weight shown:

Candy Bar Name	*Wrapper Weight Designations*
Milky Way	2½ ounces
Snickers	2½ ounces
Forever Yours	2½ ounces
Mars	1⅝ ounces
Three Musketeers	2½ ounces
Dr. I. Q.	1¾ ounces (R. 347)

When the General Maximum Price Regulation was promulgated by the Price Administrator, of the Office of Price

Administration on April 28, 1942, Mars, Incorporated had permitted its average weights to fall below those in use in March of 1942. On May 11, 1942, the effective date of the Regulation, Mars, Incorporated, increased its average weights to a level greater than its wrapper weight designation had been in March and continued to produce its six flavors at average weights in excess of the March wrapper weight designation for the entire period under consideration, that is, from May 11, 1942 until December 15, 1942. (R. 205, 236, 551, 552, 577).

The Plaintiff below, Respondent here, made no attempt to prove that there had been a reduction below the wrapper weight designation in March, 1942. The complaint was based upon two counts:

(1) That all of the bars of candy of the same kind, and boxes and cartons thereof, sold and delivered by the Defendant contained exactly the same ingredients and were exactly the same size and weight during each and every day of the entire month of March, 1942. That on and after May 11, 1942, each and every candy bar manufactured, sold and delivered was materially reduced in size and weight, and as a result thereof, all purchasers of said candy bars, and boxes and cartons thereof, have received since May 11, 1942, approximately 11% less candy than they received during the month of March, 1942. (R. 2).

(2) That Defendant failed to prepare a true and correct statement showing the highest price it charged for its commodities delivered or supplied during March, 1942. (R. 2).

Upon these two counts, Plaintiff sought to enjoin the Defendant from selling candy bars at prices in excess of those established by the General Maximum Price Regulation. (R. 2-3).

During the trial, the greatest dispute arose over whether the weights determined on March 31, 1942 should be the

basis for determination of the March price. The Respondent contended that five-cent candy bars were sold by gross shipping weight in cartons, and that any reduction below the average shipping weight in March, 1942 was illegal. (R. 1-4, 47-80, 599-611). A weight determination was made on March 31, 1942, showing an average reduction of two pounds per carton of 288 candy bars. (R. 601, 602). This amounts to a reduction of only approximately 1/10 of an ounce per candy bar. This *entire litigation centers on that 1/10* of an ounce per bar. Even though the lower weight candy was weighed, loaded in the cars, and shipped on March 31, since the Company did not begin using the lower weights for invoice purposes until April 1, the Office of Price Administration has instituted this litigation. In his opening statement Respondent's Counsel admitted the suit would not have been brought had the Respondent known that the Petitioner could prove that it had shipped under the lower agreement weights in March. (R. 36). Not only did the Petitioner prove that it had shipped the actual candy weighed on March 31, 1942 on that day, but it also proved that all candy manufactured and sold from March 23, 1942 through March 31, 1942 had been at the lower average weights. (R. 111, 185-188, 212-214, 246, 554-555, 596A).

The Respondent's principal investigator, one R. J. Reiser, spent thirty-seven days investigating, in an attempt to prove this alleged 1/10 of an ounce reduction in weight. (R. 92). Yet when he was confronted with bars made at the old and alleged new weights, the variations, if any, were so infinitesimal, he could not say which were the light weight bars nor which the heavier bars, although he had only twelve from which to choose. (R. 99; Defendant's physical exhibit, which was marked Defendant's Exhibit 2).

Plaintiff's proof was predicated upon shipping averages for cartons of 288 bars each as these weights were determined by the Western Weighing and Inspection Bureau,

and by the invoices and bills of lading used in shipping the candy. (R. 68-79, 598-609). Plaintiff did not attempt to prove any actual weights of any individual bars, boxes nor cartons. (R. 91, 148, 164). All of the evidence offered by the Plaintiff was upon average shipping weights, without regard to any actual individual bar, box or carton weights. (R. 91-92, 101).

The Defendant below, Petitioner here, responded by pleading and proving that:

(1) The sale price of its commodity had never been increased. (R. 142, 232).

(2) That Mars, Incorporated was selling individual candy bars at the weight designated on the wrapper, which bars were packed in boxes and cartons for convenience, and which individual bars were sold on a count per box basis. (R. 12, 91, 114, 226, 228, 557).

(3) That all candy bars sold and delivered after May 11, 1942 were of greater average weight than the wrapper weight designation used in March, 1942. (R. 205, 236, 550, 551, 577).

(4) That individual candy bars manufactured after March weighed more than those manufactured in March, 1942. (R. 254, 583-588).

(5) That constant ingredient changes made necessary by war time shortages caused uncontrollable variations in individual bars and general averages. (R. 238-240, 244-250, 582).

(6) That Mars, Incorporated, actually used more ingredients by weight per twenty-four bars, from May to December, 1942, than it had used in March of 1942. (R. 212, 552, 555, 596A).

(7) That it is taste, not weight, which is the determining factor in the sale of candy, and thus that gross carton ship-

ping weights were not a proper basis for determining the selling price of this commodity. (R. 26, 234, 262, 576, 580).

In response to the evidence offered by the Respondent in support of his two counts, the Petitioner proved:

(1) That the average shipping weight upon which the Plaintiff based his case were mere rough averages and were inaccurate. (R. 259-260, 292-511, 549).

(2) That when these average shipping weights were considered on a fair basis, that the reduction shown by even these inaccurate averages, amounted to only 86/100 of 1% instead of 11% as plead by Plaintiff, and apparently as found by the Circuit Court. (R. 203-207, 550, 235-236, 577.)

(3) That the "ceiling price statement" showed the accurate information required by the Regulation. (R. 111, 221).

The Petitioner raised no question as to constitutionality of the Statute involved (*50 U.S.C.A. Appendix Sec. 901*) nor the validity of the regulation (*7 Fed. Reg. 3153*). The Petitioner has made no assault upon the Office of Price Administration nor upon its price program. The Petitioner has confined itself to defense against the charges brought against it.

The Respondent has sought to make this case appear as a fight between the Government and "business" for determination of the validity of the price control program. (See opening paragraph of Plaintiff's "Extension of Oral Argument," filed with the trial Court). Nothing could be farther from the truth. Actually, the Petitioner here has never attacked the Act nor the Regulation. The Petitioner has merely consistently insisted that it has not violated the Act nor the Regulation.

During the trial the Respondent abandoned his pleadings and confessed that he was unable to prove count 1, the fundamental premise upon which his cause was based. (R. 613). Since count 2 was founded upon count 1, when the first count fell, so did the second.

The District Court found that there had been no increase in price within the meaning of the Regulation of April 28, 1942.

The Circuit Court found, in effect, that when the General Maximum Price Regulation *stated:*

> "* * * the highest price charged by a seller during March 1942 shall be:
>
> (1) The *highest price* * * * charged for a commodity *delivered* * * * by him during March 1942." (*7 Fed. Reg. 5153*)

that the Regulation actually *means:*

> "the highest price charged by a seller during March 1942 shall be:
>
> (1) The *average shipping weight* for a commodity *invoiced* by him during March, 1942." (Italics ours) (R. 670-671)

The Circuit Court granted relief which the Plaintiff had not sought in his pleadings. There was no evidence to show that such relief as was granted was either desired by the Administrator or was justified under the facts. The relief granted was wholly original with the Circuit Court since it had not been sought nor suggested by pleadings nor evidence.

The Circuit Court's ruling changed the General Maximum Price Regulation to the General Average Weight Regulation. By judicial decree, the regulation has been enlarged beyond its original scope, and the statute which authorized this Regulation has been violated.

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

(1)

In holding that the trial court was clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

(2)

In holding that the trial court was clearly wrong in finding that Petitioner had not failed to prepare a statement as required by Section 11 of General Maximum Price Regulation.

(3)

In holding that the burden of proof was upon Petitioner to prove that it had not sold any of its candy bars at prices in excess of the highest price charged therefor by Petitioner in March, 1942.

(4)

In holding that Petitioner had not proven by competent testimony that it had not sold any of its candy bars at prices in excess of those charged by it for same in March, 1942.

(5)

In holding that the burden was upon Petitioner to prove that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(6)

In holding that Petitioner had not proven by competent testimony that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(7)

In holding that the trial court was clearly erroneous in its findings of fact.

(8)

In holding that the trial court erred in dismissing Respondent's Bill of Complaint.

(9)

In holding that the trial court should have issued an Injunction as prayed for by Respondent.

(10)

In reversing the judgment of the Trial Court.

(11)

In directing the trial Court to set aside the order of dismissal of Respondent's Bill of Complaint.

(12)

In directing the trial court to enter a decree enjoining Petitioner, its officers, agents, and employees from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942, and commanding the making of a statement of such highest March prices and maintenance of the same for inspection under the Regulation providing therefor.

(13)

In directing the issuance of a decree not authorized by the Emergency Price Control Act of 1942, nor by the General Maximum Price Regulation issued thereunder.

(14)

In directing the issuance of a decree not authorized by the Respondent's pleadings.

(15)

In holding that the highest price charged in March, 1942, for commodities sold by Petitioner should be determined upon the average weights of such commodities, instead of the lowest weight thereof.

(16)

In holding that the manufacturer's tolerance on Petitioner's candy bars is only 5%.

(17)

In holding that the lowest weight of any candy bar manufactured by Petitioner after May 11, 1942, must equal the average weight of such candy bar manufactured by it in March, 1942.

(18)

In holding that the trial Judge's finding of fact based upon the Western Weighing and Inspection Bureau agreement weights was clearly erroneous; that the evidence which should have been used was the invoices and bills of lading.

(19)

In holding that it could substitute a new theory of its own as the basis for the Injunction, in lieu of the Plaintiff's pleadings, proof and grounds on appeal.

(20)

In holding, in effect, that the Circuit Court has authority to authorize the Administrator of the Office of Price Administration to order changes in business practices in industry,

even though the Statute under consideration specifically prohibited the Administrator from compelling such changes in business practices.

Reasons for Granting the Writ.

I

This case is one of unusual magnitude and of great public importance. This is particularly true on account of the departure from the General Maximum Price Regulation made by the decision of the Circuit Court of Appeals when it, in effect, held that the *average shipping weight,* rather than the *highest price* charged in March, 1942, is the correct basis for determining the ceiling price. This is an important question of Federal law, which has not been, but should be settled by this Court.

II

In holding that the burden of proof was upon Petitioner to prove its innocence of the charges made against it, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III

In directing the trial court to issue an injunction neither authorized by the General Maximum Price Regulation upon which the suit is based, nor by the pleadings in the case, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

IV

In holding that Petitioner must use the same ingredients and proportions thereof as were used by it in March, 1942, in spite of the fact that Respondent neither alleged nor

offered testimony that there was anything objectionable about the changes in ingredients and proportions thereof, although such facts were fully known to it, and in spite of the further fact that such ingredient changes and changes in proportions of ingredients were necessitated by war time conditions, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V

In holding that by sanction of a decision in the Circuit Court the Administrator of the Office of Price Administration can make violent and far-reaching changes in the business practices of industry, the Circuit Court has permitted an act which the Emergency Price Control Act specifically prohibited. As to whether the Circuit Court was authorized to take such action, is an important question of Federal law, which has not been, and should be settled by this Court.

Conclusion.

It is respectfully submitted that this petition for writ of certiorari should be granted.

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ROBERT B. HOLLAND,
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Kansas City, Missouri,
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Of Counsel,
STRASBURGER, PRICE, HOLLAND,
KELTON & MILLER.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED,

Petitioner,

vs.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the United States Circuit Court of Appeals for the Eighth Circuit:

Opinions Below.

The opinion of the District Court (R. 20) is reported in 49 Fed. Supp. 533.

The opinion of the Circuit Court of Appeals (R. 647) is reported in 135 F. 2d 843.

Jurisdiction.

The petition for rehearing filed by petitioner on May 15, 1943 (R. 673) was denied by the Circuit Court of Appeals on May 27, 1943 (R. 687).

The date of the original decree of the United States Circuit Court of Appeals was May 7, 1943 (R. 672).

Statement of the Case.

A concise statement of the case appears at pages 16 to 22 of the Petition for Writ of Certiorari, *supra*. In the interest of brevity, it is not repeated here.

Specification of Errors.

The Circuit Court of Appeals erred:

(1)

In holding that the trial court was clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

(2)

In holding that the trial court was clearly wrong in finding that Petitioner had not failed to prepare a statement as required by Section 11 of General Maximum Price Regulation.

(3)

In holding that the burden of proof was upon Petitioner to prove that it had not sold any of its candy bars at prices in excess of the highest price charged therefor by Petitioner in March, 1942.

(4)

In holding that Petitioner had not proven by competent testimony that it had not sold any of its candy bars at prices in excess of those charged by it for same in March, 1942.

(5)

In holding that the burden was upon Petitioner to prove that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(6)

In holding that Petitioner had not proven by competent testimony that it had prepared a correct statement as required by Section 11 of General Maximum Price Regulation.

(7)

In holding that the trial court was clearly erroneous in its findings of fact.

(8)

In holding that the trial court erred in dismissing Respondent's Bill of Complaint.

(9)

In holding that the trial court should have issued an Injunction as prayed for by Respondent.

(10)

In reversing the judgment of the Trial Court.

(11)

In directing the trial Court to set aside the order of dismissal of Respondent's Bill of Complaint.

(12)

In directing the trial court to enter a decree enjoining Petitioner, its officers, agents, and employees from selling, delivering, or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942, and commanding the making of a statement of such highest March prices and maintenance of the same for inspection under the Regulation providing therefor.

(13)

In directing the issuance of a decree not authorized by the Emergency Price Control Act of 1942, nor by the General Maximum Price Regulation issued thereunder.

(14)

In directing the issuance of a decree not authorized by the Respondent's pleadings.

(15)

In holding that the highest price charged in March, 1942, for commodities sold by Petitioner should be determined upon the average weights of such commodities, instead of the lowest weight thereof.

(16)

In holding that the manufacturer's tolerance on Petitioner's candy bars is only 5%.

(17)

In holding that the lowest weight of any candy bar manufactured by Petitioner after May 11, 1942, must equal the average weight of such candy bar manufactured by it in March, 1942.

(18)

In holding that the trial Judge's finding of fact based upon the Western Weighing and Inspection Bureau agreement weights were clearly erroneous; that the evidence which should have been used was the invoices and bills of lading.

(19)

In holding that it could substitute a new theory of its own as the basis for the Injunction, in lieu of the Plaintiff's pleadings, proof and grounds on appeal.

(20)

In holding, in effect, that the Circuit Court has authority to authorize the Administrator of the Offices of Price Administration to order changes in business practices in industry, even though the Statute under consideration specifically prohibited the Administrator from compelling such changes in business practices.

Summary of Argument.

POINT ONE.

The District Court was not clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

C. Petitioner Proved Without Contradiction That From May To December 1942, It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

POINT TWO.

Neither the Emergency Price Control Act nor the General Maximum Price Regulation makes any exception to March, 1942, ceiling prices on account of either manufacturing methods or formulae changes.

POINT THREE.

Respondent did not offer evidence from which the trial court could have found that Petitioner increased its prices above the March, 1942, ceiling.

A. Respondent's Case Was Based Upon False Premise.

B. Respondent's Evidence Was Predicted Upon Inaccurate Average Shipping Weights, Which Had Nothing To Do With The Selling Price.

C. Respondent Offered No Evidence As To Actual Or Accurate Weights.

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

POINT FOUR.

Since the undisputed testimony showed that the weights on petitioner's invoices and bills of lading during March, 1942, were merely averages, and were not accurate with respect to the actual weight of any candy bar, box, or carton thereof, manufactured and sold by Petitioner during March, 1942, the Circuit Court of Appeals was not authorized by the General Maximum Price Regulation to direct the District Court to enjoin Petitioner "from selling, delivering or offering for sale or delivery any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942."

POINT FIVE.

The Circuit Court was not authorized to grant relief upon a new theory of its own which was neither plead, proved, nor relied upon by Appellant upon appeal.

POINT SIX.

The Circuit Court was not authorized, on behalf of the Administrator of the Office of Price Administration, to compel far reaching changes in industry, since the Statute, being construed specifically prohibited the compelling of such changes.

POINT SEVEN.

The Circuit Court of Appeals was not authorized to find that the invoices and bills of lading weights were correct,

and the Western Weighing and Inspection Bureau Agreement weights were incorrect, when the Respondent, supported by the record, considered these weights as identical.

POINT EIGHT.

The Circuit Court was not authorized to enter a decree that had no basis in either the pleadings nor evidence offered by the Respondent.

POINT NINE.

The Circuit Court of Appeals was not authorized to set aside the finding of the trial Judge that the Respondent had failed to prove his Second Count, to-wit, that Petitioner failed to prepare a correct statement showing the highest price charged for its commodities delivered during March, 1942.

ARGUMENT.

POINT ONE.

The District Court was not clearly wrong in finding that Petitioner had not sold its candy bars in excess of the highest price charged therefor by it in March, 1942, as alleged by Respondent.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

C. Petitioner Proved Without Contradiction That From May to December 1942, It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

A. Petitioner Proved Without Contradiction That The Price Per Bar Was Not Increased.

It is undisputed that the price of the commodity sold by Petitioner remained the same throughout March, the base period, and for the subsequent time, to date (Hoben, R. 142, 232). The price at which the candy was sold was 68 cents per twenty-four bars (Hoben, R. 230-232). The Respondent admits that the price remained constant (Reiser's affidavit, R. 605).

B. Petitioner Proved Without Contradiction That Individual Candy Bars Manufactured After March, 1942, Weighed More Than Those Manufactured In March.

The Company proved, without contradiction, that as to a group of random sample bars, that the candy bars manufactured after March were appreciably increased in weight over those made in the month of March (R. 254). The witness Hoben testified that he personally weighed the sample bars. He answered the question quoted as follows:

> "Q. State whether or not in each and every instance the bars which you weighed, which were manufactured on May 11th or from that period through December 30th, were as heavy or heavier than at least one of the bars which you weighed in March?"
>
> "A. In each case, all of the bars which I weighed and which are shown on this chart were at least as heavy or heavier than bars of the same flavor which I weighed which were manufactured in March" (R. 254).

The Defendant's (Petitioner's) Exhibits 29 through 34 (R. 583-588) show the exact actual weight of each individual bar. Respondent's counsel voluntarily agreed to

raise no question about the weighing of these random sample bars (Walsh's Statement, R. 253).

The Defendant's (Petitioner's) Exhibit 36 (R. 590) shows graphically the lowest weight of each bar in each flavor. In *every* case, the lowest weight bar was made in March. In *every* case, the individual sample bars manufactured during the period from May 11 to December 30, 1942, weighed *more* than did at least *one* of the March bars.

The actual random sample bars were in the court room. The scales used for weighing them were in the Court room (R. 252). Some of these sample bars were introduced in evidence (R. 252). (It was only a desire to save unnecessary encumbrance of the record with physical exhibits that influenced the Company not to introduce all of the bars). The witness was ready to demonstrate the accuracy of his weighing, but the Administrator's counsel hastily conceded that no point would be raised on the subject (R. 253).

C. Petitioner Proved Without Contradiction That From May To December, 1942 It Actually Used More Ingredients By Weight Per 24 Bars Than It Had Used In March, 1942.

Although the Company never conceded that weight was the sole criterion upon which to consider the price of five-cent candy bars, nevertheless the Company did prove conclusively that it actually used *more* ingredients by weight per twenty-four bars than it had used in March. (The twenty-four bar basis was used purely for convenience in computation.) This showing is very significant as to the Company's *attitude* and its *intentions*.

The witness Sterns identified and verified figures showing the total poundage of ingredients that went into the candy from March 2, 1942 through December 31, 1942. He computed the poundage per twenty-four bars, by dividing

the total units of twenty-four bar boxes into the total ingredients used, for the respective periods shown (R. 212). A tabulation was presented as Defendant's (Petitioner's) Exhibit 9 (R. 554) which shows the results of this computation.

Mr. Sterns prepared a graphic chart upon which a red line appeared to indicate the ingredient changes, and a blue line appeared to indicate the March base. This chart was Defendant's (Petitioner's) Exhibit 10 (R. 555). Since the Record as prepared by Respondent does not show the blue line at all, the Petitioner has prepared the chart correctly and has included it in the Supplemental Record (R. page 596A).

Mr. Sterns explained that it was necessary to break March up into several periods, since there were appreciable variations in the ingredient content of the candy during March (R. 212). He stated that the low point in March was from March 23 to March 31, so he took that period for the "March Base" (R. 212). Incidentally, this testimony is corroborated by Mr. Hoben's statement that an ingredient reduction was made on March 23, to reduce the amount of chocolate coating (R. 246).

The record proves, without contradiction, that from May 11, 1942 through December 31, 1942 the Company actually used more ingredients per twenty-four bars than it had used during the last eight days in March (See colored chart at R. 596A).

The use of more ingredients from May 11 to December 31, 1942 is corroborated by the fact that the random sample bars taken from May 11 to December 31 were all heavier than were the sample bars taken in March (R. 583-590).

Mr. Sterns testified that his records, computations, and visual charts as to what went into the candy were based upon *actual weights*, and that he had carefully checked his records to make sure that they were correct (R. 207, 213).

He testified that he used no averages, no approximations, no interpretations, and no determinations, but only the *exact weight of what went into the candy* (R. 207).

Point Two.

Neither the Emergency Price Control Act nor the General Maximum Price Regulation makes any exception to March, 1942 ceiling prices, on account of either manufacturing methods or formulae changes.

The Circuit Court of Appeals, in holding that the burden of proof was upon Petitioner to show that any supposed reduction in weight was occasioned by either manufacturing methods or formulae changes necessitated by war conditions, has confused a compensated reduction in weight whereby no increase in price occurs, with an authorized increase in price. The fallacy of this is obvious.

In the first place, neither the Emergency Price Control Act nor the General Maximum Price Regulation makes weight the criterion for determining price. As a matter of fact, neither of them mentions weight.

The only exception permitted by the Emergency Price Control Act and the General Maximum Price Regulation is an increase in price authorized by the Office of Price Administration after formal application therefor. Obviously, the burden of proof to establish such an exception would be upon Petitioner; but testimony with respect to variations in weight due to manufacturing conditions and to changes in formulae necessitated by war conditions, could only be relevant as establishing the fact that Petitioner had not increased the price of the commodities sold by it above the March, 1942 ceiling price. No amount of testimony with respect to manufacturing methods or formulae changes would suffice to justify an increase in price.

The orders of the Office of Price Administration granting price adjustments to Petitioner's competitors permitted

uncompensated weight reductions—that is, weight reductions without any change in formulae. For example, in granting Peter Paul, Inc., the right to reduce the weight of its "Mounds" bar by 30% without any decrease in price, the Office of Price Administration made the following condition:

> "Authorization to reduce the size of Mounds is given on the specific condition that in reducing the size of this bar Peter Paul, Inc., shall not change or alter its formula for such bar in any manner" (*8 Fed. Register, 1636*) (R. 624).

In other words, the Office of Price Administration recognizes that changes in ingredients or proportions thereof might result in a price increase, irrespective of any change in weight. As a matter of fact, it is perfectly obvious that there might be an actual increase in weight and yet also an increase in price as result of inferior ingredients.

Now, then, can it be said that because the Respondent chose to offer evidence with respect to weight alone, the burden of proof was thereby shifted to Petitioner to disprove an increase in price resulting from any other factor, such as formulae changes or manufacturing methods? We submit that the burden of proof was upon Respondent to prove the price increase, and that this burden never shifted. Respondent could not choose to introduce evidence with respect to the factor of weight alone, and then insist that the burden of proof was upon Petitioner with respect to all other factors relevant to the ultimate issue of price increase.

However, as we have pointed out above, Petitioner offered evidence which not only justified, but in fact required the District Court to find that there had been no price increase by Petitioner.

As was cogently said by this Court in the recent case of *Commercial Corporation* v. *New York Barge Corp.*, 314 U. S. 104,

> "The burden of proof in a litigation, wherever the law has placed it, does not shift with the evidence."

Since this Court has seen fit to cite with approval from that eminent author, Wigmore, we deem it proper to refer to his discussion on the matter of burden of proof. He points out that the determination of this question is usually from the pleadings in the case, from which it can be determined who is desirous of having action taken by the Court. It is a simple matter to determine from the pleadings in this case who was desirous of having action taken. Respondent alleged that:

> "defendant has increased the price of all commodities sold and delivered by it * * * in excess of the highest prices charged therefor by defendant during the month of March, 1942" (R. 3);

and prayed that Defendant be enjoined "from directly or indirectly selling, delivering, or offering for sale or delivery any candy bar at prices in excess of those established by the General Maximum Price Regulation" (R. 3).

Manifestly, Respondent rather than Petitioner was desirous of having action taken by the Court, and if he was unable to convince the trial court (the trier of facts in this case) of the truth of his allegations, then he was not entitled to have the desired action taken by the Court. (*IX Wigmore On Evidence, Third Edition, Sec. 2485*).

The party having the burden of proof, or as Wigmore says, the "risk of nonpersuasion", is naturally the one upon whom first falls the duty of going forward with the evidence, because since he wishes to have the Court find for him, and since without any legal evidence at all the Court could properly take no action, there is no need for the defendant to adduce evidence. (*IX Wigmore on Evidence, Third Edition, Sec. 2487*).

(*Lillienthal* v. *U. S.*, 97 U. S. 237);

(*Omaha Hotel Co.* v. *Wade*, 97 U. S. 13);
(*Davis* v. *O'Hara*, 266 U. S. 314);
(*Reliance Life Ins. Co.* v. *Burgess*, 112 Fed. (2) 234, Certiorari denied, 311 U. S. 599).

Applying this rule to the first issue made by the pleadings, the duty rested upon Respondent to produce evidence from which the trial court could legitimately find that the Petitioner had sold its candy bars at prices in excess of those established by the General Maximum Price Regulation. If Respondent's testimony reached this point, and we earnestly contend that it never did reach a point where the Court could legitimately find for Respondent on this issue, then Respondent would have merely discharged his obligation to go forward with the evidence and there would be no duty on either party to produce evidence. Either party might do so, but there would be nothing that would require Petitioner to do so under penalty of a ruling of law against it. The risk of nonpersuasion was still with Respondent—that is, should the court be in doubt, after hearing the evidence of Respondent as to this issue, either with or without evidence from the Petitioner, Respondent would fail to obtain a finding upon that issue, and Petitioner would remain successful. *(IX Wigmore on Evidence, Third Edition, Sec. 2487).*

Point Three.

Respondent did not offer evidence from which the trial court could have found that Petitioner increased its prices above the March, 1942 ceiling.

A. Respondent's Case Was Based Upon False Premise.

B. Respondent's Evidence Was Predicated Upon Inaccurate Average Shipping Weights, Which Had Nothing To Do With The Selling Price.

C. Respondent Offered No Evidence As To Actual Or Accurate Weights.

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

A. Respondent's Case Was Based Upon False Premise.

Respondent plead:

> "that all of the bars of candy of the same kind, and boxes and cartons thereof, sold and delivered by the Defendant as aforesaid, contained exactly the same ingredients and were exactly the same size and weight during each and every day of the entire month of March, 1942." (R. 2).

The undisputed testimony in the case was exactly the converse of this allegation.

Respondent then alleged:

> "that on and after May 11, 1942 each and every candy bar manufactured, sold and delivered by Defendant as aforesaid was materially reduced in size and weight, and as a result thereof all purchasers of said candy bars and boxes and cartons thereof, have received since May 11, 1942 approximately 11% less candy than they received during the month of March, 1942." (R. 2 and 3).

The witness, Hoben, testified that the first of the above statements as quoted from the complaint was "decidedly not true" (R. 224) and why it was not true (R. 224-227). He stated that variances of ¼ to ½ ounce were normal in the Company's bars (R. 428). The trial court made the statement that he would be surprised if the Plaintiff made the contention in argument that "two candy bars weighed

the same amount to a milligram." (R. 255). Respondent's counsel said in his argument:

> "I am glad that Your Honor anticipated that it would not be the contention of any person on this side of the table, in the presentation of this matter to you that this concern could attempt to manufacture a two and one-half ounce candy bar and in a production of one billion candy bars in it exactly and precisely every time. Any person with a mind, scientific or otherwise, and possessed only with a reasonable mind knows that the human hand and the human mind has not yet achieved that degree of perfection." (R. 613).

B. Respondent's Evidence Was Predicated Upon Inaccurate Average Shipping Weights Which Had Nothing To Do With The Selling Price.

Just how inaccurate these weight determinations actually were can be seen from an examination of the record. We set this out fully under Point Four *infra*.

Respondent offered no testimony as to the weight of any candy bar or box or carton thereof, either manufactured or sold in March, 1942 or since May 11, 1942. The only evidence offered by Respondent with respect to the weight of candy bars or boxes or cartons thereof manufactured and sold by Petitioner, was evidence showing that Petitioner had, for convenience in shipping, entered into an agreement with the Western Weighing & Inspection Bureau whereby the latter, from time to time, made tests or determinations to ascertain the average weight of cartons of candy shipped by Petitioner (R. 103-105). The evidence with respect to these weight determinations clearly discloses that they were not accurate and were not supposed to be accurate with respect to the weight of any particular candy bar or box of candy or carton of candy (R. 104-106, 194-198, 259-260, 264, 549). After these determinations were made, the evidence showed, they were used on Petitioner's invoices in order to

determine the freight to be paid by Petitioner. A consignee had no interest in these weight determinations, since Petitioner paid all freight charges.

C. Respondent Offered No Evidence As To Actual or Accurate Weights.

Petitioner submits that if shipping weight is to be considered as the sole criterion for determining price, then it was necessary for Respondent to prove actual, rather than average weights. As a matter of fact, this is true even though weight is simply one of the factors and not the sole factor in determining price.

In granting price adjustments to Petitioner's competitors, the Respondent has done so on the basis of actual, rather than average shipping weights. For example, the order granting the application of Peter Paul, Inc., reads in part as follows:

> "Peter Paul, Inc., Naugatuck, Connecticut, is hereby authorized to reduce the size of its chocolate covered coconut bar, known as "Mounds" packed 24 to the box, from 2½ ounces to 1¾ ounces net *per bar*, and sell such 1¾ ounce bar at a maximum price no higher than that established for its 2½ ounce bar pursuant to the General Maximum Price Regulation." *(8 Fed. Register, 1636)* (R. 625).

A mere showing of average shipping weights would have no probative value on determination of the highest price charged by Petitioner for its candy bars during March, 1942. If Respondent's theory in this case (contrary to his theory in the granting of price adjustments) be adopted, and shipping weight be considered as the sole criterion for determining the price of the Petitioner's bars, then it was incumbent upon Respondent to prove what was the lowest weight candy bar of each flavor sold by Petitioner in March, 1942, and then to prove the sale of candy bars of less than

such weight since the effective date of the General Maximum Price Regulation. But the only testimony with respect to actual weights of candy bars manufactured by Petitioner in March, 1942 was offered by the Petitioner (R. 252-254), (R. 583-590); and furthermore, the only testimony offered with respect to the actual weight of candy bars manufactured by Mars, Incorporated subsequent to the effective date of the General Maximum Price Regulation was offered by the Petitioner (*ibid*). Likewise, the only accurate testimony with respect to the average shipping weights of Petitioner's candy bars in March, 1942 and for the period subsequent to the effective date of the General Maximum Price Regulation, was offered by Petitioner (R. 203, 550, 551).

D. Trial Court Could Find No Basis In Respondent's Evidence That Petitioner Had Increased The Price Of Its Commodities.

Demonstrative of the fact that the evidence offered by Respondent was not persuasive of the existence of a price increase is the following quotation from the opinion of the District Court:

> "It is clear, moreover, that if the change in weight results from the substitution of one ingredient for another (because, for example, a particular ingredient, as sugar, no longer is available as fully as before), the decrease in weight might have no relation to cost of manufacture. The new, lighter ingredient might cost more than the old, heavier ingredient." (R. 22).

The District Court recognized the fact that the burden was upon the Respondent to prove that the alleged price increase resulted from other changes in the commodities manufactured and sold by Petitioner. The Court will remember that Respondent alleged that these commodities "contained exactly the same ingredients * * * during

each and every day of the entire month of March, 1942."

The District Judge said:

> "There has been no negation of other possibilities that might have effected so slight a decrease in weight." (R. 22).

There is little wonder that Judge Otis was not convinced that there had been a price increase. The only method by which he could have arrived at such a conclusion would have been as a result of speculation and conjecture. With the testimony in this condition, the trial court could not find for the Respondent that there had been a price increase.

And yet, the Circuit Court of Appeals, on the basis of this inconclusive testimony offered by Respondent, and in spite of the uncontradicted testimony offered by Petitioner, has seen fit to set aside as clearly erroneous, the finding of the trial court that there had been no increase in the price of Petitioner's commodities. We do not believe that it was ever the intention of this Court, in adopting Rule 52 (a) of the *Rules of Civil Procedure*, to permit such action by a Circuit Court of Appeals as has been taken by the Circuit Court of Appeals in setting aside the findings of fact by Judge Otis.

Point Four.

Since the undisputed testimony showed that the weights on Petitioner's invoices and bills of lading during March, 1942 were merely averages and were not accurate with respect to the actual weight of any candy bar, box, or carton thereof, manufactured and sold by Petitioner during March, 1942, the Circuit Court of Appeals was not authorized by the General Maximum Price Regulation to direct the District Court to enjoin Petitioner "from selling, delivering, or offering for sale or delivery any candy bars

at prices in excess of the highest prices shown on its invoices and bills of lading during March, 1942.''

Proof of the inaccuracy of the weights as shown upon the invoices and bills of lading is inescapable. At no time has the Respondent ever offered any evidence that these weights were accurate, nor did the Circuit Court cite any portion of the record to indicate that these weights were accurate.

Just how inaccurate the shipping weights as used upon the invoices and bills of lading actually are is apparent from a review of the record. There are facts in evidence which prove that these Western Weighing and Inspection Bureau certified weights, as used upon the invoices and bills of lading were sufficient for shipping purposes, but were *totally inaccurate and unreliable when used as a method for determining the exact weight* of the candy. These facts in evidence are:

(1) The man who did the weighing testified for the Respondent that some of the cartons weighed were not included in the averages, and that he made inquiry only when he found ''great differences'' in weights as between those in use, and those disclosed by the then average weights (R. 104-106).

(2) Taking into consideration the explanation offered as to how the weighing was done, a difference in carton weights of ''Dr. I.Q.'' candy bars of six pounds as between the fourth and fifth carton weighed is found at the weighing done on March 31, 1942. This is a variation of some 16% (R. 105, 304).

(3) Of the total candy produced at the estimated rate of 11,000 cartons per day (R. 188) for a 300-day year, the total annual production would be approximately 3,300,000 cartons. According to the Respondent's witness

Tranker, and the weight certificates in evidence, only about 2,200 cartons were weighed annually (R. 292-330). 2,200 is only .066% of 3,300,000. Thus, if the weigher found a 16% variation in only two cartons out of the 66/1000 of 1% examined, quite obviously there was an insufficient number weighed to secure a dependable average for pricing purposes.

(4) The Respondent's witness Ewing admitted that the method of weighing used by the Western Weighing and Inspection Bureau was not the most accurate method available for determining true averages (R. 173). Furthermore, Ewing confessed that insofar as the Western Weighing and Inspection Bureau was in error, that *all of the Respondent's computations and analyses* based upon these averages, *were also in error* (R. 173).

(5) There is uncontradicted testimony by the Secretary of Mars, Incorporated, that the actual average shipping weights would run "over and under" the weights as established by Western Weighing and Inspection Bureau at various times (R. 264).

(6) Variations in weight of the candy caused by normal manufacturing practices, substitutions because of war time shortages, and container material variations, were constant. As to the normal manufacturing variances, and substitutions because of war time shortages, the testimony was explicit and uncontradicted (R. 224-227, 238-240, 244-249). A Civil Service employe of the United States Forest Products Laboratories testified, without contradiction, that a range of 14.1 ounces variation would be expected in the container materials alone (R. 181-182).

(7) Absolute proof of the inaccuracy of the weights as shown upon the invoices and bills of lading is shown by the actual weighing of eleven carloads of candy. The

testimony in this connection is clear, uncontradicted, and conclusive (R. 194-198, 259-260, 549). A chart which was introduced in evidence shows the full information as to the car numbers, dates of weighing, gross and net car weights, actual net content weights compared with the weights as shown upon the invoices and bills of lading, etc. (R. 549). Four columns taken from that chart, with designation changes for clarification, show:

Car Number	Actual Net Content Weight	Invoice and Bill of Lading Weights	Error in Invoices & Bill of Lading Billing	Assortment Content
1127	70,520	69,487½	1032½ (over)	Asst. No. 1
1100	69,420	69,487½	67½ (under)	Asst. No. 1
1220	68,040	67,855	185 (over)	Asst. No. 2
1044	67,480	67,855	375 (under)	Asst. No. 2
1134	70,180	69,487½	692½ (over)	Asst. No. 1
1004	69,720	69,487½	232½ (over)	Asst. No. 1
1217	69,540	69,487½	52½ (over)	Asst. No. 1
1129	70,100	69,487½	612½ (over)	Asst. No. 1
1196	69,100	69,487½	387½ (under)	Asst. No. 1
1075	69,740	69,487½	252½ (over)	Asst. No. 1
1191	70,120	67,855	2265 (over)	Asst. No. 2

It will be noted that Assortment No. 1 always is shown on the invoices and bills of lading, made in accordance with the Western Weighing and Inspection Bureau agreement averages, at a weight of 69,487½ pounds, but that the actual weight of this assortment in only eight cars varied from a high of 70,520 to a low of 69,100 pounds—a difference between the first car and the ninth car of 1420 pounds. On Assortment No. 2, the difference between the fourth car and the eleventh car is 2640 pounds. Since there were only 1300 cartons of candy in each assortment, this indicates an average difference of slightly more than *two pounds per carton*, between the candy in the fourth and the eleventh car. If there is this great a difference when the candy is averaged by using 1300 cartons as a unit for averaging, the difference between single cartons, single twenty-four bar boxes and individual bars must have been much greater.

This is clear, uncontradicted, explicit proof that the weight shown upon *every invoice and bill of lading* used in shipping out the 4,118,400 individual candy bars, contained in the 14,300 shipping cartons, which were loaded into the eleven freight cars *was absolutely wrong*, and *wholly inaccurate* (R. 549).

A recapitulation of the seven points enumerated above shows that constant fluctuations in the weight of raw materials, individual bars, container materials, shipping cartons, and carload lots were normal and unavoidable. All commercial shippers and all carriers recognize this fact. Neither *shippers nor carriers would ever contend that estimated shipping weights established by weighing agreements were accurate.*

A weight disclosed by scales governs over a weight shown in the bill of lading. (*Baird* v. *St. Louis I. M. & S. Ry. Co.*, 41 F. 592.)

The purpose of estimated weights is to avoid the delay, expense and labor incident to the actual weighing of each particular shipment. (*Davis* v. *Ill. Central Ry. Co.*, 16 I. C. C. 376.)

If the commodity is not susceptible of a reasonably accurate estimated weight, there should be sufficient margin between the minimum and maximum weights to allow for reasonable variations between the estimated and the actual weights. Actual weighing is the only way in which weight can be ascertained to a certainty, but this practice is not always convenient, practical or even advisable. (*Georgia Rough & Cut Stone Co.* v. *Georgia Ry. Co.*, 13 I. C. C. 401.)

Under the provisions of the Bill of Lading Act, the shipper is bound by the recitations in the bill of lading only when marked "shipper's weight, load and count" (Aug. 29, 1916 c. 415, Sec. 20, 39 Stat. 541). No such wording, nor comparable nor similar wording appears upon the bills of lading used by Petitioner. (R. 562). In the absence

of such wording, the weight shown is actually the weight as established by the railroad. Tranker, the inspector for Western Weighing and Inspection Bureau, who was called as a witness by Respondent, testified that he made the weight determinations, *in advance,* and that in performing that service *he was working for the railroads* (R. 105, 106). The record shows that in every instance the Company accepted and used the weights *exactly as determined by this representative of the railroads.* (R. 291-330).

In effect, the Circuit Court by its decision has ruled that an inaccurate and inexact broad shipping average, determined by the carrier for convenience in handling, must be accepted by a manufacturer as the sole basis for determining the selling price of his commodity. The basic fact is ignored by the Circuit Court, that neither the shipper nor carrier ever thought that there was the most remote possibility that they were establishing a selling price as between the manufacturer and the purchaser when they made an agreement to use estimated average shipping weights for shipping purposes. Also ignored by the Circuit Court is the fact that as between the manufacturer and purchaser, an entirely different method of pricing was used in which the railroad carrier had no interest whatsoever. (R. 91, 114). The Circuit Court has wholly failed to grasp the vast distinction between using rough averages for *shipping* purposes (where the purchaser was not involved, since the manufacturer paid all the freight charges) and using a similar rough average shipping weight for *selling* purposes.

In the sale of Stetson Hats as the District Court pointed out, (R. 23) the wholesaler would not be a law violator if the May hats weighed each an ounce less than the March hats.

Surely, in the sale of diamond rings, fur coats, or soft drinks, the price could not be said to have been established by the adoption of a shipping agreement average between

the manufacturer and the carrier, where the shipper paid the freight charges, and the purchaser had no interest in either the shipping weight nor the amount charged for transportation.

To imagine the adoption of such a rule as the Circuit Court has ordered is to envision chaos. Yet, if the Circuit Court can ignore the established business practices in the food industry, and compel a complete change in the traditional, established methods of doing business there, then the Circuit Court must have identical power to order such a change in any other industry. It staggers the imagination to contemplate the resulting catastrophe in American business if the Administrator of the Office of Price Administration decides to regulate the diamond, fur coat, soft drink, hat, automotive, locomotive, and wrist-watch businesses by fixing the price of all commodities in each of these industries in accordance with the average shipping weight of each such commodity in March of 1942. This seems too absurd to consider, yet the fixing of the sale price of five-cent candy bars in accordance with the estimated shipping weight averages of the gross shipping containers *is equally as absurd.*

From the opinion of the Circuit Court of Appeals, it is manifest that that court concluded that weight was the sole criterion for determining the price of the commodities sold by Petitioner; and since the only weight shown on Petitioner's invoices and bills of lading in March, 1942 were average weights, admittedly inaccurate as to the actual weight of any candy bar or box or carton thereof manufactured and sold by Petitioner during March, 1942, the effect of the decision of the Circuit Court of Appeals is to enjoin the Petitioner from selling any candy bar or box or carton thereof with a weight less than the *average weight* thereof in March, 1942.

The effect of this is to impose an impossible burden upon Petitioner, since the undisputed testimony showed that there was an uncontrollable variation of ¼ to ½ an ounce per bar, and of several pounds per carton, and of several thousand pounds per carload, of candy bars manufactured and sold by Petitioner, it will be necessary for Petitioner, in order to comply with the injunction directed to be issued by the Circuit Court of Appeals, to keep the lowest weight of any candy bar or box or carton thereof, manufactured by it, up to the average weight of the candy bars and boxes and cartons thereof manufactured by it during March, 1942. In view of the uncontrollable variation in weights, this will mean that the average weight of candy bars manufactured by Petitioner under the decree directed to be issued by the Circuit Court of Appeals, will necessarily considerably exceed the average weight of the candy bars manufactured and sold by Petitioner in March, 1942.

Furthermore, Respondent's pleading does not authorize the decree directed to be issued by the Circuit Court of Appeals. The prayer is that the Petitioner be enjoined from selling any candy bars "at prices in excess of those established by the General Maximum Price Regulation", which translated to this case as conceived by the Circuit Court of Appeals would mean that the Petitioner be enjoined from selling any candy bar at weights less than the lowest weight of any candy bar manufactured and sold by Petitioner in March, 1942. But the injunction directed to be issued by the Circuit Court of Appeals is against sales in excess of an *average price* (or average weight) (R. 670) whereas, the injunction prayed for by Respondent was against sales in excess of the *highest* price (lowest weight) charged (R. 3, 4).

Point Five.

The Circuit Court was not authorized to grant relief upon a new theory of its own which was neither plead, proved, nor relied upon by Appellant upon appeal.

Judge Gardner, speaking for the Eighth Circuit in *Ramming Real Estate Co.* v. *U. S.*, 122 F. 2d 892, held:

> "It is well settled that the theory upon which the case was tried in the Court below must be adhered to upon appeal."

The cases are in agreement that where the suit was brought upon one theory in the court below, that on review the Plaintiff cannot change to another theory which the Defendant was not required to meet below. *Virginia Railroad Co.* v. *Mullens*, 271 U. S. 220, 70 L. Ed. 915, 46 S. Ct. 526; *Van Huffel* v. *Harkelrode*, 284 U. S. 225, 76 L. Ed. 256, 52 S. Ct. 115; *Peck* v. *Henrich*, 167 U. S. 624, 42 L. Ed. 302, 17 S. Ct. 927; *Foster* v. *Special Site Sign Co.*, 85 F. 2d 742, certiorari denied 57 S. Ct. 315, 299 U. S. 613, 81 L. Ed. 452.

If the Plaintiff cannot change the theory of the right of recovery upon appeal, then surely the Circuit Court cannot lawfully do so. Yet, that is exactly what the Circuit Court did here. Recovery was predicated upon a wholly erroneous assumption; that is, that there was a distinction between the weights as shown upon the weight determinations of Western Weighing and Inspection Bureau and the weights of the invoices and bills of lading. (R. 670). Upon this incorrect assumption, the Circuit Court changed the theory of the Plaintiff's right of recovery from a claimed price increase above March 1942 highest prices, to a claimed weight reduction below the *average* shipping weights in March of 1942.

By a metamorphosis of the Circuit Court, the average shipping weights established in January of 1942 *for ship-*

ping purposes only, have been transformed into the highest prices in March for selling and delivery purposes. We respectfully suggest that the Circuit Court is without authority to engage in such legerdemain.

POINT SIX.

The Circuit Court was not authorized, on behalf of the Administrator of the Office of Price Administration, to compel far-reaching changes in industry, since the Statute, being construed specifically, prohibited the compelling of such changes.

As is set out in our petition for certiorari the Circuit Court has ignored subsection (h) of the Emergency Price Control Act *(50 U. S. C. A. App. Sec. 901 to 946)* which prohibits the Administrator of the Office of Price Administration from compelling changes in business practices, cost practices, or means of distribution, established in any industry, except to prevent circumvention or evasion of any regulation. There is no claim made that the changes enumerated in our petition for certiorari were ordered to prevent circumvention or evasion. So, it would appear there is no justification for the Circuit Court by judicial decree having performed a ministerial act for the Administrator which he could not lawfully perform for himself.

This provision, which prohibits changes in business practices was inserted to protect industry from the very abuses that have been sanctioned here. This provision was inserted by the House Committee H. R. 5990, 77th Congress, 1st Session (1941), eliminated by the Senate Committee H. R. 5990, 77th Congress 2d Session (Jan. 2, 1942) and restored on the floor of the senate H. R. 5990 77th Congress 2d Session (January 12, 1942).

During the Senate debate, Senator Vandenberg explained this section by saying: "In other words there is an effort

to draw a distinct line between a traditional, standard, appropriate, habitual business practice and one which might be invoked to evade this new control" (88th Cong. Rec. Jan. 8, 1942, p. 108; 9 Pike & Fisher OPA Service 700: 128).

If we can accept Senator Vandenberg's statement as the basis upon which this section was restored as a part of the Statute, it becomes apparent that the Circuit Court has done the very thing that Congress said should *not* be done.

The evidence in this case shows that the "traditional, standard, appropriate, habitual, business practice" in the candy industry was for the manufacturer to sell his product upon an individual bar basis, packed a given number of bars in a box for convenience in shipping and handling. Dealers in candy, who testified for Respondent, called this a "count per box" basis. (R. 91, 114). These dealers said that they never weighed the candy, that they were interested only in the *count per box;* that is, how many nickel candy bars they received. (R. 91, 114). Every invoice introduced in evidence showed that the invoices carried the designation printed upon their face "—Boxes 24 Count 5¢ Milky Way." (R. 350-475.) The sample invoice introduced in evidence, shows the same designation. (R. 228-229, 556, 557). The Secretary of Mars, Incorporated testified:

> "We do business on a candy bar basis; we manufacture and sell and ship it on that basis." (R. 228).

Now, the "traditional, standard, appropriate, habitual business practice" has been changed. No longer can the candy industry—unless Mars, Incorporated has been discriminated against—sell upon the traditional method of a count per box basis of individual candy bars. Now, by official decree of the Circuit Court, the sale must be in accordance with the "invoices and accepted bills of lading which showed the weights at which the candy was shipped." (R.

670). Furthermore, the traditional method of writing up invoices in advance, the traditional variations permitted between individual bars, the traditional tolerances permitted on shipping weight agreement, have all been outmoded by this Circuit Court opinion. (See our Petition for Certiorari, under Point Five.) The fact that the Circuit Court confused traditional variations of from 10% to 20% as between individual bars, with the variation of 5% permitted between actual and billed shipping weights, did not interest that Court sufficiently to cause it to correct that mistake, even when this was specifically called to the Court's attention in Petition for Rehearing. (R. 683-686).

Point Seven

The Circuit Court of Appeals was not authorized to find that the invoices and bills of lading weights were correct, and the Western Weighing and Inspection Bureau Agreement weights were incorrect, when the Respondent, supported by the record, considered these weights as identical.

The Circuit Court condemns the findings of the trial court as "clearly erroneous" because these findings are based upon "certified weights" and says that, "the evidence which should have been used is the invoices and accepted bills of lading showed the weights at which the candy was shipped" (R. 670).

This is a most unfortunate error. By "certified weights" the Circuit Court is referring to the weights as established by the Western Weighing and Inspection Bureau. The Circuit Court has overlooked the fact that the sole basis for the "Invoices and accepted bills of lading weights" is the very "certified weights" which it has just condemned.

These record references are covered rather completely in our petition for certionari under Point Three. We shall not repeat them here.

We copy a short excerpt from the Appellant's Brief in the Circuit Court at page 15 where the Respondent recognizes that the Bureau, invoice, and bill of lading weights are identical by saying:

> "The documentary proof of the Administrator consisted of hundreds of invoices and bills of lading for individual shipments (B. 1, 537 and B. 2 complete) showing upon their face the Company's carton shipping weights * * *. Basic to this phase of the Administrator's proof was his showing that the shipping weights inscribed on the invoices and bills of lading were weights computed for Mars at frequent and periodic intervals by the Western Weighing and Inspection Bureau * * * under a contract between said Bureau and Mars * * * and uniformly used by Mars as its shipping weights * * *"

Thus, the Circuit Court is in the position of basing *its entire decision* upon a conception which both the Respondent and the Petitioner agree *is wholly erroneous.*

If the Respondent seeks in this Court to sustain the Circuit Court's decision on this point, he will have to squarely contradict the position he took in both the District Court and the Circuit Court.

Point Eight

The Circuit Court was not authorized to enter a decree that had no basis in either the pleadings nor evidence offered by the Respondent.

Under the First Question discussed in our petition for certiorari we called attention to the fact that the Circuit Court's instructions called for the entry by the trial court of a decree that was neither sought nor authorized in the Plaintiff's pleadings.

As was pointed out, the Plaintiff sought to restrain Petitioner from selling any candy bar at prices in excess

of those established by the General Maximum Price Regulation. No mention was made in the Prayer of March weights nor of invoices, nor bills of lading. (R. 3, 4). The temporary restraining order, issued by the District Court without notice to Mars, Incorporated on the day the Complaint was filed, uses the identical language of the prayer in the Complaint. (R. 5, 6). Again there is no mention of March weights, nor of invoices nor bills of lading. (R. 5, 6). In his Brief in the Circuit Court, in the concluding paragraph, the Respondent says:

> "We respectfully submit that the * * * trial court should be instructed to enter * * * a decree pursuant to the prayer in the Administrator's complaint." (Appellant's Brief P. 58).

In disregard of these pleadings, the pattern set by the preliminary injunction, and the plea in the Appellant's Brief, the Circuit Court upon its own motion ordered the entry of a decree based upon March weights as shown upon the invoices and bills of lading used that month.

As an example of the utter impossibility of compliance with such an order, the record shows that for one type of package used, there are actually two invoice weights for the same type of shipping assortment in March of 1942. On March 2, 1942, 1 carton of 6 boxes 48 count 5¢ Double Box Assortment with a shipping weight of 54 pounds was sold to Schanker Tobacco Company by Mars, Incorporated for a price of $1.36 per box of forty-eight bars. The six such boxes contained in the carton were sold for $8.16. (R. 364). An identical transaction took place between the same parties on March 30, 1942, but on this occasion two cartons weighed only 51 pounds each, according to the invoice and bill of lading, yet the price was the same. (R. 366, 367). The explanation for the weight change is found in the fact that a new weight determination was made for the double box assortment on March 6, 1942 (R. 302). The

representative of the Western Weighing and Inspection Bureau, who made this new weight determination made a notation on the weighing record, "Change made in candy bar, also size of carton." (R. 302). But, though the change in the shipping carton weight is explained, there is no explanation as to how Mars, Incorporated can follow the Circuit Court's Order, nor obey the injunction. The Circuit Court orders that the trial Court shall. "enjoin defendant * * * from selling * * * any candy bars at prices in excess of the highest prices shown on its invoices and bills of lading during March 1942, etc."

What is the highest price on the double box assortment as shown by the invoices and bills of lading during March? The price is $1.36 per box, or $8.16 per carton in all instances, but obviously the Court does not mean merely the price. If the Circuit Court means that price and weight are to be considered inversely, then does that mean that all future shipments of the double box assortment shall be at the lower weight? Unfortunately for this theory, the number of each kind of bar contained in the double box assortment was changed in March. In this method of packing the candy bars, an assortment of either five or six of the named candy bars was included with a given number of each kind in each of the six boxes. In some of the assortments "Mars" bars were included, so all six bars were assembled in these packages. In others, the other five named bars were included but "Mars" were not. This would clearly indicate an actual change in weight, since "Mars" is the lightest bar, but according to the invoices and bills of lading, some of the old assortments weighed the same as the new ones. This could not be true, yet that is what the invoices and bills of lading show. Clearly, this is an instance of using estimated shippng weights for convenience.

Since there were two such assortments in use in March, which one may Mars, Incorporated use? No guidance nor tolerance is permitted by the Court's Opinion and the resulting injunction.

Had the Plaintiff plead for such an injunction, the Defendant could have had an opportunity to show that the compliance by the Defendant would have been impossible in the ordinary manufacturing business. Presumptively, upon the showing that compliance was not possible, the injunction would not then have been ordered.

Since the injunction as finally issued was not sought in pleadings, nor considered by the parties, the Defendant had no chance to show the injury it would suffer by the entry of such an order. In ordering an injunction neither plead, proved nor sought on appeal, the Circuit Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As was said in the recent case (1940) of *Drybrough* v. *Ware*, 111 F. (2d) 548:

> "The enforcement of rights and obligations in judicial procedings depends upon issues disclosed by pleadings which must be supported by evidence offered by the parties, and a decree may not be based on mere conjecture, supposition or speculation * * *."

The Tenth Circuit in *Osage Oil and Refining Company* v. *Continental Oil Company*, 34 F. (2d) 585, certiorari denied 287 U. S. 616, 53 S. Ct. 17, 77 L. Ed. 535, held:

> "Issues not raised by the pleadings cannot be determined. *U. S. vs. Goldstein* (C. C. A. 8) 271 F. 838, 845 * * *.
>
> "A decree insofar as it undertakes to decide issues not raised by the peladings is void. *Jorgenson Co. vs. Rapp* (C. C. A. 9), 157 F. 732; *Reynolds vs. Stockton*, 140 U. S. 254, 11 S. Ct. 773, 35 L. Ed. 464 * * *.

"A Court is without jurisdiction to pass upon questions not submitted to it for decision (citing a long list of authorities)."

Other authorities to the same effect are: *Southern Railway Co.* v. *Montgomery* (C. C. A. 5), 46 F. (2d) 990; *Dubinsky* v. *Lortz* (C. C. A. 8) (decided in 1942), 129 F. (2d) 669; *Twachtman* v. *Connelly* (C. C. A. 6), 106 F. (2d) 501; *Indemnity Insurance Co.* v. *Moses* (C. C. A. 5), 36 F. (2d) 219.

In another case where the Court sought to go outside of the pleadings, it was held in *re Wesley Corporation* 18 F. Supp. 347:

"It seems clear that inability to afford the relief sought did not warrant gratuitously granting an altogether different and uncalled for relief as a substitute."

Point Nine.

The Circuit Court of Appeals was not authorized to set aside the finding of the Trial Judge that the Respondent had failed to prove his second count, to-wit, that Petitioner failed to prepare a correct statement showing the highest price charged for its commodities delivered during March, 1942.

The sole ground upon which Respondent sought to establish this allegation was that there had been no shipments during March, 1942 of candy bars of the weight shown on the Western Weighing and Inspection Bureau's weight determination of March, 1942.

As a matter of fact, Respondent admitted in the trial Court that if there had been shipments of candy bars during March, 1942 with the weight as shown in the weight determination of March 31, 1942, the suit would never have been brought.

As we have heretofore pointed out in our petition for writ of certiorari, practically all of the candy manufactured in

any given day was shipped on that day. The testimony of Respondent was that none of the bills of lading and invoices issued by Petitioner during the month of March, 1942 contained the weight determination made by the Western Weighing and Inspection Bureau on March 31, 1942.

Actually, all of the candy shipped from March 23 to March 31, 1942 was candy comparable in weight to that weighed, sold, and delivered on March 31, 1942. The testimony is undisputed that the amount of coating used on the candy bars was reduced on March 23, 1942 (R. 246). The amount of ingredient used in the candy from March 23 to March 31, 1942 was less than at any other time during that month (R. 212, 554, 555, 596). As is shown on the exhibits, the average weight of raw material that went into each twenty-four bars manufactured from March 23 to 31 was only 3.912 pounds as compared with the period of March 9 to 14 when 4.018 pounds were used (R. 554). This is graphically borne out in the visual application of these figures on a chart (555, and 596A). Conclusive proof is found in the testimony of the Petitioner's witness Pobloske (R. 185-194) and the Respondent's witness Tranker (R. 103-112).

If a weight determination had been made at any time between March 23 and March 31, obviously comparable weights to those found on March 31 would have been established. This is inescapable, since it was the reduction in the chocolate coating which took place on March 23 that caused the perceptible general average fall in the candy bar weights at that time (R. 246). But, simply because the inspector for Western Weighing and Inspection Bureau did not happen to come to Mars, Incorporated to make a weight determination until March 31, the Circuit Court has held that the weights which had actually been in effect since March 23 were not applicable. The Western Weighing and Inspection Bureau inspector, when testifying on behalf of the Respondent, says he saw the very cartons which he weighed

on March 31 actually loaded at that time in the freight car (R. 111). Pobloske says these cars were actually hauled away from the loading platform by the railroad on the morning of that day (R. 187). Pobloske testified that approximately 11,000 cartons (or 3,168,000 candy bars) were produced on March 31 (R. 188). Pobloske stated that *all* the candy shipped on March 31 was comparable in weight to that weighed by Mr. Tranker on that date (R. 188). None of this testimony was contradicted nor questioned. A part of it was introduced by the Respondent. The Respondent offered no rebuttal testimony.

Despite this clear, uncontradicted evidence, the Circuit Court declared that the trial Court's finding that the weights established on March 31 were "clearly erroneous". Instead of being based upon the record, the Circuit Court's conclusion is based upon the unsupported possibility that these shipments of approximately 11,000 cartons (3,168,000 candy bars) might have been all shipped to the Defendant's warehouses in Dallas and Newark. This Opinion was reached despite the fact that there was not one iota of testimony in the record that Mars had any warehouse at Dallas nor at Newark in March of 1942 (R. 668).

Conclusion.

By confusing a means used by the railroads for their convenience in determining freight charges on the one hand, with the pricing methods that have been long established in the piece and package goods industry, on the other hand; the Respondent has led the Circuit Court into most grievous error. The Circuit Court went further in its opinion than the Respondent asked the Court to go.

Although the Respondent is asking this Honorable Court to approve the decision of the Circuit Court, *the Respondent himself has refused to follow the Circuit Court's opinion in determining the selling price of five-cent candy bars.* This

is strikingly illustrated in an order filed by the Respondent as to another candy company's commodity, on August 6, 1943, some three months after the Circuit Court's opinion was delivered on May 7, 1943. This order determines a selling price for a new candy bar of one of Petitioner's competitors on a "count per box" basis. Weight is not considered except that the wrapper weight designation is part of the description of the bar. In this order, no mention is made of invoices, bills of lading, nor average shipping weight. The order reads in part:

> "That E. J. Brach & Sons, Chicago, Illinois, is authorized to sell to wholesalers its 5¢ retail '1¾ ounce Chocolate Pudding Bar', packed 24 to the box, at the maximum delivery price of 68 cents per box * * *." *(8 Fed. Reg. 11036).*

Here is clear evidence that Mars, Incorporated has been discriminated against. Here is an unmistakable confession that the Respondent is not willing to follow the method prescribed by the Circuit Court in fixing the selling price of 5¢ candy bars. Here is irrefutable proof that *the Respondent agrees* that the "traditional, standard, appropriate, habitual business practice" in determining the selling price of 5¢ candy bars is upon a "count per box" basis, and that *shipping average weights, invoices and bills of lading have no connection* whatsoever *with such selling* price. Either the Circuit Court in its opinion against Mars, Incorporated has ordered a change in a business practice in industry which even the Respondent finds is too violent to follow; or else, there has been a wholly unwarranted and unjustifiable prejudicial discrimination against Mars, Incorporated.

We respectfully suggest that in this case against Mars, Incorporated the Respondent and the Circuit Court in their earnest desire to enjoin the Petitioner, have moved with more zeal than discernment. We sincerely believe that upon

a review of this entire case that this Honorable Court will find that the District Court was correct in dismissing the Plaintiff's Complaint.

It is respectfully submitted that the accompanying petition for writ of certiorari should be granted.

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(8127)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	3
Statement	6
1. The company's manufacturing processes and shipping practices	9
2. Sources of the Administrator's proof of weight changes	12
3. Changes in price and weight	14
4. The Administrator's proof under Count 2	15
5. The company's contentions	16
6. Findings and conclusions of the courts below	18
Argument	20
Conclusion	25
Appendix:	
Emergency Price Control Act of 1942	26
Table A.—Shipment weights—December 31, 1941	14, 27
Table B.—Shipment weights—January 8, 1942	14, 28
Table C.—Shipment weights—January 21, 1942	14, 28
Table D.—Shipment weights in effect throughout month of March, 1942	14, 15, 16, 29
Table E.—Shipment weights—April 1, 1942	14, 15, 29
Table F.—Shipment weights—May 1, 1942	14, 15, 30
Table G.—Shipment weights—May 11, 1942, to December 16, 1942, compared with base period weights—March 1942 as shown by Administrator's proofs	14, 15, 16, 31
Table H.—Shipment weights—May 11, 1942, to December 16, 1942, compared with March 31, 1942, shipment weights alleged by Mars, Incorporated	32

CITATIONS

Cases:	
Anderson v. *Hershey*, 127 F. (2d) 884	24
Electric Storage Battery Company v. *Shimadzu*, 307 U. S. 5	20
United States v. *Cushman*, 136 F. (2d) 815	24

563249—43——1

Statute: Page
Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C., App., Supp. II, Sec. 901 *et seq.*):
Section 2 (g) ---- 26
Section 2 (h) ---- 24, 26
Section 4 (a) ---- 26
Section 205 (a) ---- 6, 27
Miscellaneous:
General Maximum Price Regulation (7 Fed. Reg. 3153), April 28, 1942:
Section 1 ---- 4
Section 2 ---- 4, 6
Section 11 ---- 4, 5, 15
Section 20 ---- 5, 6
Section 23 ---- 4
O. P. A. Service 11: 1026 *et seq* ---- 6
Rules of Civil Procedure, Rule 15 (b) ---- 24

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 299

MARS, INCORPORATED, PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion, findings of fact, conclusion of law, and decree of the District Court (R. 20) are reported in 49 F. Supp. 533. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 647) is reported in 135 F. (2d) 843.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Eighth Circuit was entered May 7, 1943 (R. 672). A petition for rehearing

was denied on May 27, 1943 (R. 687). The petition for a writ of certiorari was filed in this Court on August 27, 1943. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether proof of shipment weights of millions of candy bars as shown (1) on invoices for all shipments during the base pricing period established by the Regulation, and (2) on invoices for shipments subsequent to the effective date of the Regulation, was properly received in evidence as proof, respectively, of petitioner's base-period weights and subsequent unlawful weight reductions, where the invoice weights were average carton weights, expertly and disinterestedly determined and daily checked and verified.

2. Whether a showing (1) that price increases in the form of weight reductions had occurred, and (2) that the defendant manufacturer was able to control its weights within the range of weight reductions thus shown, was a sufficient *prima facie* showing of violation so that, assuming the relevance of evidence purporting to excuse the weight reductions on the basis of technical factors or wartime shortages peculiarly affecting defendants' manufacturing operations, the burden of proof as to these possible excuses in an injunction proceeding rested on the defendant manufacturer.

3. Whether the injunction decree is subject to the construction that it obliges petitioner to sell candy bars at prices lower than the maximum legal prices.

4. Whether the injunction compels changes in petitioner's business in contravention of section 2 (h) of the Act.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C., Appendix, Supp. II, Sec. 901 *et seq.*)[1] and the General Maximum Price Regulation (7 Fed. Reg. 3153) issued thereunder on April 28, 1942.

The pertinent provisions of the Act are set forth in the Appendix, *infra,* pp. 26–27.

The General Maximum Price Regulation, issued three months after the adoption of the Act, extended comprehensive maximum price control to virtually all commodities subject to the Act. It applies to both retail and wholesale sales. The method of control established is that of the "base period" maximum price. Each seller's prices are fixed at the highest prices which he charged during a designated base period, to wit, the month

[1] The Act was renewed by the amendatory Act of October 2, 1942 (56 Stat. 765, Sec. 7 (a), 50 U. S. C., Appendix, Supp. II, Sec. 961 *et seq.*), the original expiration date being thereby extended from June 30, 1943, to June 30, 1944. The amendatory Act is not otherwise applicable.

of March 1942 (Sec. 2 (a)). Records of base period sale prices are required to be prepared and maintained by all sellers (Sec. 11 (b)). The Regulation became effective as to wholesale or manufacturing sellers on May 11, 1942 (Sec. 23).

The pertinent provisions of the Regulation are the following:

> SECTION 1. *Prohibition against dealing in commodities or services above maximum prices.*—On and after the effective date of this Regulation, regardless of any contract or other obligation:
>
> (a) No person shall sell or deliver any commodity, * * * at a price higher than the maximum price permitted by this Regulation; * * *.
>
> * * * * *
>
> SEC. 2. *Maximum prices for commodities and services: General provisions.*—Except as otherwise provided in this Regulation, the seller's maximum price for any commodity * * * shall be:
>
> (a) In those cases in which the seller dealt in the same * * * commodities * * * during March 1942:
>
> The highest price charged by the seller during such month—
>
> (1) For the same commodity * * *.
>
> * * * * *
>
> For the purposes of this Regulation, the highest price charged by a seller "during March 1942" shall be:

(a) The highest price which the seller charged for a commodity delivered * * * by him during March 1942; * * *.

SEC. 11. *Base-period records.*—Every person selling commodities * * * for which, upon sale by that person, maximum prices are established by this Regulation, shall:

* * * * *

(b) Prepare, on or before July 1, 1942, on the basis of all available information and records, and thereafter keep for examination by any person during ordinary business hours, a statement showing:

(1) The highest prices which he charged for such of those commodities * * * as he delivered or supplied during March 1942 and his offering prices for delivery or supply of such commodities * * * during such month, together with an appropriate description or identification of each such commodity * * *;

* * * * *

SEC. 20. *Definitions and explanations.*—This Regulation, and the terms appearing therein, unless the context otherwise requires, shall be construed as follows:

* * * * *

(d) *Delivered.*—A commodity shall be deemed to have been "delivered" during March 1942, if during such month it was received by the purchaser or by any carrier, including a carrier owned or con-

trolled by the seller, for shipment to the purchaser.

* * * * *

(m) *Records.*—"Records" includes books of account, sales lists, sales slips, orders, vouchers, contracts, receipts, invoices, bills of lading, and other papers and documents.

As applied in the present proceeding, the provision in Section 2 (a) of the Regulation that no seller may charge a higher price for a commodity than he charged for the "same" commodity in March 1942, means not only that the monetary price may not be increased, but also that a prohibited price increase may not be accomplished by reducing the weight or quantity of the commodity.[2] It is to be noted also that the base period price established as the maximum legal price is that charged for commodities "delivered" in March 1942; and that the Regulation defines the term "delivered" as receipt by the purchaser or by a carrier for shipment to the purchaser.

STATEMENT

Pursuant to section 205 (a) of the Act, the Administrator filed his complaint in the District Court on December 14, 1943 (R. 1), following an extensive investigation of petitioner's business

[2] This obvious meaning of the Regulation was early confirmed by official interpretations of the Administrator, OPA Service 11 : 1026 *et seq.*

and records (R. 48–49). The complaint was in two counts. The first averred that Mars, Inc., was engaged in the business of manufacturing candy bars and selling them in box and carton quantities (24 bars to a box, 12 boxes to a carton) to commercial purchasers exclusively, freight prepaid; that the price, size, weight, and ingredients of all the candy sold and delivered by the company during March 1942, the base pricing period established by the Regulation, remained constant throughout the entire month; that, in violation of the Regulation and the Act, the company materially reduced the weights of candy manufactured, sold, and delivered by it on and after May 11, 1942, the effective date of the Regulation, without a corresponding reduction in price; that this uncompensated weight reduction amounted to approximately eleven percent; and that the company would continue these unlawful weight practices unless restrained (R. 1–3). The second count averred that the company, in violation of the Regulation and the Act, had failed to prepare and maintain a true and correct statement of its ceiling prices together with an appropriate description of the commodities sold and delivered during the March 1942 base period, in that it had incorrectly listed the base period weights at weights less than the true ones (R. 3). The complaint prayed for broad permanent and interlocutory injunctive relief re-

563249—43——2

straining the company from charging prices in excess of those established by the Regulation and from otherwise violating any Regulation under the Act establishing maximum prices for the company's candy products, and directing the company to prepare and maintain a proper statement of ceiling prices; and for other "just and proper" relief (R. 3–4).

The company in its answer denied all the essential allegations of the complaint which charged violations of the law (R. 9–14).

After a trial, the district court entered an opinion, findings of fact, and conclusion of law (R. 20–27) and denied injunctive relief (R. 28). On appeal, the decree was reversed. The circuit court of appeals ordered the issuance of an injunction (1) restraining petitioner from selling its candy products at prices in excess of the maximum legal prices established by the Regulation and (2) directing petitioner to prepare and maintain a proper statement of its ceiling prices as shown by its base period records (R. 671–672). The injunction as so ordered was entered by the District Court on June 29, 1943, and continues in effect.[3]

For an understanding of the extent to which the issues raised are factual, and the extent to which the courts below concurred in resolving the issues (see pp. 18–20, *infra*), it is necessary to set

[3] The injunction order is not a part of the present Record.

forth a résumé of the essential evidence and contentions of the parties.

1. *The company's manufacturing processes and shipping practices.*—Mars, Inc., is one of the largest and most successful candy manufacturing companies in the world, with gross annual sales of $20,678,464.33 in 1941 (R. 334) and an estimated gross of 20 percent more in 1942 (R. 277), representing sales of approximately 900,000,000 five-cent bars in 1942 (R. 188, 334). The company's products, while manufactured for the retail candy trade in the form of individually wrapped five-cent bars of six varieties (R. 335), are sold and shipped to wholesalers and retailers in carton lots of 288 packaged bars, each carton containing 12 boxes, each box containing 24 individual bars (R. 270–272, 348–499). Thus, the business of this company is that of a wholesale producer shipping and selling its products in standardized wholesale quantity lots.

The candy manufacturing plant operated at Chicago, Illinois, by Mars, Inc., is a model of efficiency and precision in the control of the manufacturing process at all its stages (R. 47–104, 118–144), including control over the weight and composition of its products. The company has also achieved utmost efficiency and precision in its cost accounting and production formula analysis methods, with its calculations customarily carried out to the fifth decimal point (Pl. Exs.

40 to 89, Tr. 944 to 1242).[4] The company's control over its production processes is shown by the proof that upon entry of a temporary restraining order against the company on December 14, 1942 (R. 5), it was able within three days to bring about the mathematically precise change in *gross* weights (i. e., including packaging) required for a return to the gross March weights shown by the Administrator (R. 283–284; Pl. Ex. 16, column of weights for March 1–31 and for December 17 and 18, R. 333; Pl. Exs. 11, 12, and 13, R. 322–329).

As is set forth *infra,* pp. 16–17, the company claimed that it encountered wartime shortages with regard to white sugar, cocoanut oil and chocolate. Subsequent to January 10, 1942 (Pl. Exs. 40, 41, Tr. 944–950) and also subsequent to April 25, 1942 (Pl. Exs. 55, 56, Tr. 1033–1039), the company increased the proportion of corn syrup in its formula to compensate for a reduction in the amount of white sugar. This change did not in any way affect the amounts of other ingredients contained in the products. Again, on April 16, 1942, the Company instituted the use of a refined soybean oil (Kelko) (R. 268–269) as a substitute for the previously used cocoanut oil, both being commonly described as "hard butter." This substitution did not result in any manufacturing

[4] The parties have stipulated (R. 689–691) for the omission of certain record matter below from the present printed Record, with the right reserved to refer here to the original record pages of matter so omitted (designated "Tr.").

difficulties, as is apparent by reference to lines 15, 16 of Plaintiff's Exhibit 90, for weeks of April 13–18 and April 20–25, 1942 (R. 500). The exhibit shows that the Company maintained weights identical with those maintained in the two weeks preceding the use of the substitute oil and that in no instance during this period was it necessary to change the quantities of other ingredients in order to maintain its weights. The company used the substitute oil in exactly the same amounts as the previously used cocoanut oil.

Striking examples of the Company's precise control, unimpaired by wartime shortages, are furnished by Plaintiff's Exhibits 90 to 95 (R. 500–505), which show the formulae for all six of the company's bars in the period December 21 to 26, 1942, following the entry of the temporary restraining order against the company. As appears from the last line of Exhibit 90 (R. 500), the "Milky Way" bar manufactured in that period carried 10 percent less chocolate coating and approximately 18½ percent less white sugar than during March 1942 and carried Kelko in the same amount as cocoanut oil during March 1942. Despite these changes in ingredients the company produced the finished product at the same average weight as during March 1942. The example is duplicated in the Record with respect to the company's other five bars: "Snickers" bar (last line, Pl. Ex. 91, R. 501); "Forever Yours" bar (last

line, Pl. Ex. 94, R. 504); "Dr. I. Q." bar (last line, Pl. Ex. 95, R. 505); "The 3 Musketeers" bar (last line, Pl. Ex. 92, R. 502); "Mars" bar (last line, Pl. Ex. 93, R. 503).

2. *Sources of the Administrator's proof of weight changes.*—The Administrator's proof of weight changes was taken from the company's own records, namely the unimpeached invoices and bills of lading in evidence (R. 348–499; Tr. 537–943). The invoices established the shipping weights in the base period, March, 1942; a separate and individual inspection of each and every March, 1942, invoice formed the basis of this phase of the Administrator's proof (R. 68–69, 145). The invoices also showed the accumulation of violations on and after May 11, 1942, the effective date of the Regulation.

Further, the Administrator showed that the shipping weights inscribed on the invoices and bills of lading were weights computed for the company at frequent and periodic intervals by the Western Weighing and Inspection Bureau (R. 104–112), under a contract between the Bureau and the company (R. 346), subject to daily check and actually so checked by the company itself (R. 86–87) and uniformly used by the company as its shipping weights and as the basis of its payments of millions of dollars in railroad freight charges over a period of many years. When weight changes were made by the company, it notified the Bureau, asking for a special certi-

fication of the changes (R. 106), and the changes are noted in the records prepared by the Bureau and by the company (e. g., R. 298–300, 322–324; R. 325–328). The Administrator put in evidence the records of these weight determinations, paralleling and tying in with the invoice records of actual shipments and shipment weights (R. 291–331).

The weight determinations were made by expert employees of the Western Weighing and Inspection Bureau, whose method of operations was careful and accurate in the highest degree. The weighing procedure followed gave weights of one, two, three, and four cartons, then the weight of five cartons including the four previously weighed, then another weight of five cartons, and finally four weights of ten cartons. Thereafter an *average* weight was reached by adding the weights of all the cartons so checked and dividing by fifty, the total number weighed. This process was done separately for each type of bar. In this manner average weights were computed which accurately represented individual carton weights. Accurate average figures for individual bar weights were computed by deducting the weights of packaging and wrapping materials, and dividing the resultant net carton weight by 288, the number of bars per carton. (R. 56–57, 64–65, 94–96, 104–112, 291–331, 520 et seq.; Tr. 534.)

Finally, the Administrator introduced "formula cost sheets" or "cost sheets" prepared in the company's offices, disclosing certain statistical data as to changing weights of raw ingredients from time to time (Tr. 1075–1242), and bearing a consistent relationship to the actual shipping weights as disclosed by the invoices and bill as lading (R. 520–548).[5]

3. *Changes in price and weight.*—The first price or weight change by Mars, Inc., shown in the Record was an increase of 6.25 percent in the price per box of 24 bars, i. e., from 64 cents to 68 cents, on September 25, 1941, the box price thereafter remaining at 68 cents down to the time of the trial (R. 143). Subsequent weights and weight changes are shown in Tables A to G, inclusive (see Appedix, pp. 27–31, *infra*).

Tables A, B, and C show shipping weight reductions from December 1941 through January 1942. These are not set forth, of course, as instances of violation, but as evidence of the systematic character of weight reductions in the company's products and its ability to control the weight. As reduced on January 21, 1942, effecting gains to the company of more than 19 percent on the two leading bars since the price increase of September 25, 1941, and substantial

[5] Reference to data contained in these "cost sheets" and analyses there was made heretofore, pp. 9–12, *supra*, in our statement of the Administrator's proofs on the issue of the company's ability to control weights.

gains on the other bars, the weights continued without further change until April 1, 1942. Table D (p. 29, *infra*) shows the weights during the March 1942 base period, as disclosed by the 10,000 invoices for all shipments during that month (R. 68–69, 145). After the base period, but before May 11, 1942, the effective date of the Regulation, two interim weight reductions occurred, on April 1, 1942, and May 1, 1942 (Tables E and F, pp. 29, 30, *infra*).

Reductions after May 11, 1942, constituting violations of the Regulation and Act, are shown in Table G, *infra*, p. 31. Because of the detail in the data, only the figures for the largest-selling bar are shown; similar tables for the additional bars were submitted in the brief in the court below. The dates given are illustrative only, taken from the more complete evidence in the record. The Table shows decreases ranging to almost 10 percent of the base-period weight.

After the restraining order of December 15, 1942, the weights were restored to the March 1942 amounts (R. 333; Cf. R. 322–328 with R. 350–355).

4. *The Administrator's proof under Count 2.*— As heretofore noted, Count 2 of the complaint alleged that the company failed to maintain a true statement of its ceiling prices as required under Section 11 (b) of the Regulation (*supra*, p. 5), in that it made false statements as to its March 1942 weights. The Administrator

563249—43——3

showed that the company's ceiling price records (R. 347) were false in that the March weights indicated thereon were, in fact, less than the actual weights (see Tables D and G, pp. 29, 31, *infra,* and the exhibits from which they are derived).

5. *The company's contentions.*—The company sought to establish that weight reductions in its products might be attributable to "uncontrollable variations" in individual and average weights (Pet. 20, par. (5)) due to variations in manufacturing tolerances, moisture absorption, and dehydration of carton and other container materials, and substitution of new ingredients for, or reduction in the use of, certain ingredients rendered scarce by reason of the war (R. 225–228, 238–241, 244–251, 264–270, 272–276). The purport of this explanatory matter was apparently to demonstrate that the company's manufacturing processes were impossible to control as to finished weights within the limits of the weight reductions shown to have occurred subsequent to May 11, 1942 (R. 198–224, 235–242, 244–255, 584–589, 591, 592). The explanatory matter thus offered by the company was contradicted, as seen, by the Administrator's proof that the company maintained a scientifically precise control of its manufacturing processes, and that this control was not diminished by the alleged disturbance occasioned in the company's opera-

tions by wartime material shortages (see pp. 9–12, *supra*). Further, the company's claims regarding the effect of moisture conditions upon carton materials would in any event account for only an insignificant part of the weight reductions shown (R. 182–185).

The company also sought to establish that no reduction below its March, 1942, weights had in fact occured. The contention giving rise to the "greatest dispute" (Pet. 18–19) was that a weight reduction was effected on March 31, 1942, during the base period. Under the Regulation (*supra*, pp. 5–6), the base weight must be that of a commodity "delivered" or received by a carrier "for shipment to the purchaser" during March, 1942. The company's contention in this regard rested primarily upon the oral testimony of one of its shipping employees (R. 185–194),[6] and was not supported by documentary evidence, but was in conflict with the documentary proofs covering *all* March shipments. The oral testimony offered by the company on this point was limited to the claim that cartons at the lower weights were placed in a common carrier on March 31, with

[6] An employee of the Western Weighing and Inspection Bureau (Tranker), a witness called by the Administrator, testified that he saw candy weighed by him at new weights on March 31 loaded into a freight car on the company's siding on that date. He was unable to testify that the car departed or that the candy was otherwise shipped for "delivery" to a purchaser on that date (R. 111–112).

no showing as to the destination of the alleged shipment, whether to a buyer or to one of the warehouses used by the company[7] (R. 263–264; compare Deft's Ex. 4, R. 550). The lower March 31, 1942, weights thus claimed by the company were identical with certain actual shipping weights which the Administrator acknowledged were used on April 1, 1942, but not prior thereto (R. 477 *et seq.*). The further contention was made that, accepting the Administrator's position regarding the March, 1942, weights, no reduction occurred thereafter. The company offered the testimony of one of its officers to the effect that a random sampling (made by him on a basis not explained) of 120 bars of all six types manufactured after the effective date of the Regulation showed weight increases over the March base period weights shown by the Administrator (R. 250–255). Testimony was also introduced by the company purporting to show that the Administrator's use of average shipping weights was improper on the ground that such weights were inaccurate as averages because not determined with sufficient exactness, and also on the ground that these average shipping weights did not correspond with a few specific instances of actual weights (R. 194–198, 259–260, 265, 550).

[7] The statements in the petition (pp. 16, 65) that there is "not one iota of testimony in the record that petitioner owned any warehouses" or "had any warehouse at Dallas nor at Newark in March of 1942" must be taken to refer to ownership as distinguished from use.

6. *Findings and conclusions of the courts below.*—On the issue whether the company had effective control over average weights, the district court found in the affirmative (R. 22; Fdg. 2, R. 26), and the circuit court of appeals concurred (R. 659–661).

On the issue whether the weight reductions actually resulted from the exercise of such control, the district court reached no conclusion, but held that the burden of showing purposeful change rested on the Administrator, and that the conclusion, if established, would not be significant (R. 22–23). The circuit court of appeals held that the burden of accounting for the reductions otherwise than by deliberate change rested on the company (R. 655–656).

On the issue of the minimum weights for March 1942, the district court accepted figures close to those contended for by the company (Fdg. 6, R. 26–27). The circuit court of appeals held that this finding rested on an improper evidentiary basis, and that, as the Administrator maintained, the March 1942 invoices should have been used (R. 667–670).

On the issue whether weight reductions below the March 1942 level were proved, the district court found in the affirmative, though the amounts found were less than those contended for by the Administrator, in view of the court's treatment of the March 1942 base (R. 23–24, 26–27). The circuit court of appeals, accepting the Administra-

tor's base-period evidence, necessarily held that greater reductions had been established than found by the district court (R. 661–662, 667–670, 671).

On the issue whether the use of average shipping weights was proper, both courts ruled that it was (R. 22, 26–27; 663–667, 670).

The district court's refusal to issue an injunction was based on its view that the weight of petitioner's products might be reduced without violating the law, unless, perchance, the change was as "palpable" as the cutting of a bar in half and its sale as two bars (R. 23–24). The circuit court of appeals held that a decrease in the weight of a food such as candy is equivalent to an increase in price (R. 654–655), and that an injunction should have been issued even on the basis of the weight reductions found by the district court (R. 662).

ARGUMENT

Petitioner does not now deny that weight reductions in its products, such as the reductions here involved, constitute in substance price increases, as the Administrator has consistently ruled. See note 2, page 6, *supra*. Petitioner's contentions are in the main addressed to the factual issues in the case and present no question calling for further review.

The essential facts were found against petitioner by both courts below, and those findings

will be accepted here. *Electric Storage Battery Company* v. *Shimadzu*, 307 U. S. 5, 9. Both courts found that weight reductions below the applicable base-period weights had been established. Petitioner's evidence concerning a sampling of individual bars (p. 18, *supra*) was thus not persuasive. Both courts accepted proof of average shipping weights, and thus rejected the contention that these were not accurately determined. Both courts likewise found that petitioner was able to control the weight of its products within the limits of the changes found either by the district court or by the circuit court of appeals.

In one particular the circuit court of appeals rejected the findings of the district court as clearly erroneous, that is, the findings with respect to the specific weights during the base period. The reasons for that rejection are fully set forth in the opinion below (R. 667–670). Petitioner argues (Pet., pp. 8–9, 55, 58) that the circuit court of appeals fell into confusion in rejecting the district court's use of the Western Weighing and Inspection Bureau certificates while itself adopting the invoice records which rested on such certificates. The confusion, however, is not the court's. The court preferred the invoices to the certificates, not because of any supposed difference in their sources, as the opinion shows (R. 667–668, 669), but because the invoices alone were competent to show "delivery," and for

the date March 31, 1942, that factor was critical.[8]

The court below properly held, for the reasons stated by it (R. 655–656), that petitioner had the burden with respect to explaining demonstrated weight changes on the ground of uncontrollable variations in manufacture and materials. The court did not hold, as petitioner argues (Pet., pp. 14–16, 23) that the burden was on it to prove its innocence. Moreover, it is submitted that even if the burden of proof on the issue involved was on the Administrator, the burden was met by the evidence demonstrating petitioner's ability systematically to control the weight of its products (pp. 9–12, *supra*).

The courts below did not err in relying on evidence of average shipping weights. The weight determinations were made regularly by the Weighing Bureau at the instance of petitioner, were careful and thorough, and were subject to a daily "spot check" by petitioner itself. Weight changes were specially certified by the Bureau and by petitioner. See pp. 12–13, *supra*. The nature of petitioner's enterprise is such that a high degree of standardization is required, which is a standard based on a highly accurate average. No injury results from the employment of an average test for weights in this case. If petitioner were en-

[8] Even if petitioner's asserted base weights were accepted, substantial violations were proved. Table H, *infra*, p. 32, relating to the largest-selling bar, shows reductions below petitioner's asserted base exceeding five percent.

titled to take as its base weight the lightest bar or carton delivered in March 1942, it would follow that after the effective date of the Regulation the lightest weights would similarly be controlling. The use of averages for both periods fully compensates for the refusal to take the lightest weights during the earlier period. Moreover, the nature of this type of case is such that documentary proof must be resorted to in lieu of the actual weighing of individual items which have long since been distributed and consumed. Effective price control for nondurable products would be impossible if it were necessary to secure proof of current weights, much less base-period weights, by going back of the regular records to the physical products themselves.

Petitioner contends (Pet. 54) that the decree, in enjoining it from selling at prices above those shown on its invoices and bills of lading for March 1942, requires it to sell at prices lower than the base-period prices, because, it is argued, if a single carton should drop below the invoice weight for the base period the injunction would be violated. It is argued, in short, that a minimum weight must now be maintained equal to the average weight in March 1942. These apprehensions rest upon an unfounded construction of the decree. The obvious meaning of the decree, as the Administrator will recognize in possible enforcement proceedings, is that the average shipping

weights must not drop below the average shipping weights for the base period.

Petitioner contends, finally (Pet. 11–14, 56–58), that the decree involves changes in business practices in violation of Section 2 (h) of the Act. The requirement that it maintain its average shipping weights at the March 1942 level should not, however, entail any departure from its practices during the base period, when its average shipping weights remained constant, as indeed they did for the preceding period from January 21, 1942, to March 1, 1942 (pp. 14–15, *supra*). The requirement that it maintain accurate records should likewise occasion no material departure, in view of the flexibility of petitioner's practice in the preparation of invoices, which were capable of being written within a day after a new weight determination (R. 312, 484). The decree simply gives effect to the applicable Regulation; and the Regulation has not been attacked, nor could it be in this proceeding, in view of Section 204 (d) of the Act.[9]

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[9] The contention (Pet. 9–11) that there was a fatal variance between pleadings and proof was disposed of by the court below (R. 652), and its holding was clearly correct. See Rule 15 (b), Rules of Civil Procedure; *United States* v. *Cushman*, 136 F. (2d) 815 (C. C. A. 9); *Anderson* v. *Hershey*, 127 F. (2d) 884 (C. C. A. 6).

CONCLUSION

The decision below is correct and presents no question meriting review by this Court. The petition should be denied.

Respectfully submitted.

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DECEMBER 1943.

APPENDIX

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 50 U. S. C. App., Supp. II § 901 *et seq.*

SEC. 2. * * *

(g) Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof.

(h) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

* * * * *

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

TABLES

TABLE A.—*Shipment weights—December 31, 1941*

Name of bar	Carton gross average wgt. (lbs.)	Carton net average wgt. (lbs.)	Bar net average wgt. (oz.)
Milky Way	62.5	57.718	3.20656
Snickers	62.5	57.718	3.20656
Three Musketeers	66.	59.687	3.31594
Mars	39.	32.97	1.83167
Forever Yours	61.5	55.124	3.06244
Dr. I. Q	46.5	40.47	2.24833
	(Sources: Plf's Ex. 29 Tr. 743 *et seq.*)	(Paper wgts. from Ex. 14, Tr. 512, subtracted from first column.)	(Col. 2 divided by 288 bars per carton — and converted to ounces.)

TABLE B.—*Shipment weights—January 8, 1942*

Name of bar	New weights shipped—January 8, 1942			Reduction effected by this change		
	Carton gross average wgt. (lbs.)	Carton net average wgt. (lbs.)	Bar (average) net weight (oz.)	Decrease per net carton (lbs.)	Net decrease per bar (oz.)	Percent of decrease below former wgt.
Milky Way	58.5	53.718	2.98433	4.	0.22223	6.93
Snickers	59.	54.218	3.01211	3.5	.18945	5.92
Three Musketeers	61.5	55.178	3.06544	4.51	.25050	7.55
Mars	39.	32.97	1.83167	0.00	.00000	0.00
Forever Yours	57.5	51.124	2.84022	4.	.22222	7.26
Dr. I. Q.	43.5	39.324	2.18467	1.15	.06366	2.83
	(Sources: Plf's Ex. 30, Tr. 749, *et seq.*)	(Paper weight from Plf.'s Ex. 14, Tr. 512, subtracted from first column.)	(Col. 2 divided by 288 bars per carton and converted to ounces.)			

TABLE C.—*Shipment weights—January 21, 1942*

Name of bar	New weights shipped—January 21, 1942			Reduction effected by this change			
	Carton gross average wgt. (lbs.)	Carton net average wgt. (lbs.)	Bar (average) net weight (oz.)	Decrease per net carton (lbs.)	Net decrease per bar (oz.)	Percent of decrease	Total percent of decrease since Dec. 31, 1941
Milky Way	55.	50.218	2.78989	3.5	0.19444	6.52	12.99
Snickers	55.	50.218	2.78989	4.	.22222	7.38	12.99
Three Musketeers	55.5	49.178	2.73211	6.	.33333	10.87	17.61
Mars	36.5	32.324	1.79578	0.65	.03589	1.96	1.96
Forever Yours	54.5	49.718	2.76211	1.41	.07811	2.75	9.80
Dr. I. Q.	43.5	39.324	2.18467	0.00	.00000	0.00	2.83
	(Sources: Plf's Ex. 31, Tr. 752, *et seq.* Weights shown to be in effect on January 21, 1942 by Plf's Ex. 1, Tr. 477, 478, 481, 482)	(Paper weights from Plf's Ex. 14, Tr. 512, subtracted from first column)	(Col. 2 divided by 288 bars per carton and converted to ounces)				(See Table A.)

TABLE D.—*Shipment weights in effect throughout month of March, 1942*

Name of bar	Carton gross average wgt. (lbs.)	Carton net average wgt. (lbs.)	Bar (average) net wgt. (oz.)	Total percentage decrease since Dec. 31, 1941
Milky Way	55	50.218	2.78989	12.99
Snickers	55	50.218	2.78989	12.99
Three Musketeers	55.5	49.178	2.73211	17.61
Mars	36.5	32.324	1.79578	1.96
Forever Yours	54.5	49.718	2.76211	9.80
Dr. I. Q	43.5	39.324	2.18467	2.83
	(Sources: Pif's Ex. 31, Tr. 752 *et seq.*)	(Paper weights from Ex. 14, Trans. 512 subtracted from first column.)	(Col. 2 divided by 288 bars per carton and converted to ounces.)	(See Table A.)

NOTE.—The March weights here shown had been in effect since January (see Table C).

TABLE E.—*Shipment weights—April 1, 1942*

Name of bar	New weights shipped—April 1, 1942			Reduction effected by this change			
	Carton, gross average wgt. (lbs.)	Carton, net average wgt. (lbs.)	Bar, net average wgt. (oz.)	Decrease per net carton (lbs.)	Net decrease per bar (oz.)	Percent of decrease below Dec. 31, 1941	Percent of decrease below March wgt.
Milky Way	53	48.218	2.67877	2.00	0.11111	16.46	3.98
Snickers	53.5	48.718	2.70656	1.50	.08333	15.59	2.99
Three Musketeers	54.5	48.178	2.67656	1.00	.05550	19.28	2.03
Mars	35	30.824	1.71244	1.50	.08333	6.50	4.64
Forever Yours	53	48.218	2.67877	1.50	.08341	12.53	3.02
Dr. I. Q	41.75	37.73	2.09611	1.60	.08856	6.78	4.05
	(Source: Pif's Ex. 32 Tr. 771 *et seq.*)	(Paper weight from Ex. 14, Tr. 512 subtracted from first column)	(Column 2 divided by 288 bars per carton and converted to oz.)			(See Table A)	(See Table D)

TABLE F.—*Shipment weights—May 1, 1942*

Name of bar	New weights shipped—May 1, 1942			Reduction effected by this change				
	Carton gross average wgt. (lbs.)	Carton net average wgt. (lbs.)	Bar net average wgt. (oz.)	Decrease per net carton (lbs.)	Net decrease per bar (oz.)	Percent of decrease below former wgt.	Percent of decrease below Dec. 31, 1941	Percent of decrease below March wgt.
Milky Way	50	45.52	2.52889	2.70	0.14988	5.60	21.13	9.36
Snickers	48.25	43.77	2.43167	4.95	.27489	10.16	24.17	12.84
Three Musketeers	51.25	45.77	2.54278	2.41	.13378	5.00	23.32	6.92
Mars	34.5	30.48	1.69333	.34	.01911	1.11	7.61	5.70
Forever Yours	50.25	45.706	2.53922	2.51	.13955	5.20	17.09	8.07
Dr. I. Q	40.75	36.73	2.04056	1.00	.05555	2.65	9 24	6.60
	(Source: Plf's Ex. 34—Tr. 797 *et seq.*)	(Paper weight from Plf's Ex. 14, Tr. 512 subcontracted from first column)	(Column 2 divided by 288 bars per carton and converted to oz.)				(See Table A)	(See Table D)

TABLE G.—*Shipment weights—May 11, 1942, to December 16, 1942, compared with base period weights—March 1942 as shown by Administrator's proofs*

Col. 1	Col. 2	Col. 3	Col. 4		Col. 5	Col. 6		Col. 7	Col. 8	Col. 9	Col. 10	Col. 11
Name of bar	Date	Total avg. wgt. per carton (lbs.)	Source of col. 3		Total avg. paper wgt. per carton (lbs.)	Source of col. 5		Avg. net candy wgt. per carton col. 3 less col. 5 (lbs.)	Avg. net candy wgt. per bar col. 7 divided by 288 bars per ctn. and converted to oz. (oz.)	Net avg. wgt. increase or decrease per carton from base (+) or (−) (lbs.)	Net avg. wgt. increase or decrease per bar from base (+) or (−) (oz.)	Petg. of increase or decrease from base (+) or (−)
			Ex. No.	Tr. pp.		Ex. No.	Tr. pp.					
Milky Way	Mar. 1-31, 1942	55	31	752 et seq.	4.782	14, 16	512, 522	50.218	2.78989			
	May 11, 1942	50	34	806 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−4.70	−0.26100	−9.36
	May 12, 1942, low [1]	50	34	825 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−4.70	−.26100	−9.36
	May 12, 1942, high [1]	51.5	34	823 et seq.	4.48	14, 16	512, 522	47.02	2.61222	−3.20	−.17767	−6.37
	May 13, 1942, low	50.	34	831 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−4.70	−.26100	−9.36
	May 13, 1942, high	51.5	34	833 et seq.	4.48	14, 16	512, 522	47.02	2.61222	−3.20	−.17767	−6.37
	May 14, 1942, low	50.	34	876 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−4.70	−.26100	−9.36
	May 14, 1942, high	51.5	34	885	4.48	14, 16	512, 522	47.02	2.61222	−3.20	−.17767	−6.37
	May 28, 1942	51.5	36	886	4.76	14, 16	512, 522	46.74	2.59667	−3.48	−.19322	−6.93
	July 3, 1942	51.5	36	887 et seq.	4.76	14, 16	512, 522	46.74	2.59667	−3.48	−.19322	−6.93
	Aug. 1, 1942	51.5	39	900	4.76	14, 16	515, 522	46.74	2.59667	−3.48	−.19322	−6.93
	Aug. 5, 1942	51.5	39	901 et seq.	4.76	14, 16	515, 522	46.74	2.59667	−3.48	−.19322	−6.93
	Aug. 5, 1942	53.5	39	902 et seq.	4.76	14, 16	515, 522	48.74	2.70778	−1.48	−.08211	−2.94
	Nov. 9, 1942	53	38	892 et seq.	4.47	14, 16	520, 522	48.53	2.69611	−1.69	−.09378	−3.36
	Dec. 4, 1942	53	38	897 et seq.	4.47	14, 16	517, 522	48.53	2.69611	−1.69	−.09378	−3.36
	Dec. 14, 1942	53	39	903 et seq.	4.47	14, 16	517, 522	48.53	2.69611	−1.69	−.09378	−3.36
	Dec. 15, 1942	53	39	906 et seq.	4.47	14, 16	517, 522	48.53	2.69611	−1.69	−.09378	−3.36
	Dec. 16, 1942	53	39	908 et seq.	4.47	14, 16	517, 522	48.53	2.69611	−1.69	−.09378	−3.36

[1] The product was shipped at two weights on the days immediately following May 11, 1942.

TABLE H.—*Shipment weights May 11, 1942, to December 16, 1942, compared with March 31, 1942, shipment weights alleged by Mars, Incorporated*

Col. 1	Col. 2	Col. 3	Col. 4		Col. 5	Col. 6		Col. 7	Col. 8	Col. 9	Col. 10	Col. 11
			Source of col. 3			Source of col. 5						
Name of bar	Date	Total avg. wgt. per carton (lbs.)	Ex. No.	Tr. pp.	Total avg. paper wgt. per carton (lbs.)	Ex. No.	Tr. pp.	Avg. net candy wgt. per carton col. 3 less col. 5 (lbs.)	Avg. net candy wgt. per bar col. 7 divided by 288 bars per ctn. and converted to oz. (oz.)	Net avg. wgt. increase or decrease per carton from base (+)or (−) (lbs.)	Net avg. wgt. increase or decrease per bar from base (+) or (−) (oz.)	Percentage of increase or decrease from base (+) or (−)
Milky Way	Mar. 31, 1942	53	5	485 et seq.	4.782	14, 16	512, 522	48.218	2.67878			
	May 11	50	34	806 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−2.70	−0.14989	−5.60
	May 12 Low	50	34	825 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−2.70	−.14989	−5.60
	May 12 High	51.5	34	823 et seq.	4.48	14, 16	512, 522	47.02	2.61222	−1.20	−.06656	−2.49
	May 13 Low	50	34	831 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−2.70	−.14989	−5.60
	May 13 High	51.5	34	833 et seq.	4.48	14, 16	512, 522	47.02	2.61222	−1.20	−.06656	−2.49
	May 14 Low	50	34	876 et seq.	4.48	14, 16	512, 522	45.52	2.52889	−2.70	−.14989	−5.60
	May 14 High	51.5	34	885	4.48	14, 16	512, 522	47.02	2.61222	−1.20	−.06656	−2.49
	May 28	51.5	36	886	4.76	14, 16	512, 522	46.74	2.59667	−1.48	−.08211	−3.07
	July 3	51.5	39	887 et seq.	4.76	14, 16	512, 522	46.74	2.59667	−1.48	−.08211	−3.07
	Aug. 1	51.5	39	900 et seq.	4.76	14, 16	515, 522	46.74	2.59667	−1.48	−.08211	−3.07
	Aug. 5	51.5	39	901 et seq.	4.76	14, 16	515, 522	46.74	2.59667	−1.48	−.08211	−3 07
	Aug. 5	53.5	38	902 et seq.	4.76	14, 16	515, 522	48.74	2.70778	+.52	+.02900	+1.08
	Nov. 9	53	38	892 et seq.	4.47	14, 16	520, 522	48.53	2.69611	+.31	+.01733	+.65
	Dec. 4	53	38	897 et seq.	4.47	14, 16	517, 522	48.53	2.69611	+.31	+.01733	+.65
	Dec. 14	53	39	903 et seq.	4.47	14, 16	517, 522	48.53	2.69611	+.31	+.01733	+.65
	Dec. 15	53	39	906 et seq.	4.47	14, 16	517, 522	48.53	2.69611	+.31	+.01733	+.65
	Dec. 16	53	39	908 et seq.	4.47	14, 16	517, 522	48.53	2.69611	+.31	+.01733	+.65

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